

BY MR. STEWART:

Q Good morning, Dr. Crandall.

A Good morning, Mr. Stewart, nice to see you.

Q There you go. We had a disagreement about that just yesterday with respect to a cross examiner.

(Laughter.)

A I will be polite even if we disagree.

Q Would you turn to the first page of your testimony.

A The rebuttal testimony?

Q Correct, yes. And this first section here begins with paragraphs 4 and 5 on this page?

A Yes.

Q You essentially say that the Bortz Study is a -- provides a proper measure the Panel to use in allocating the royalties in this case. Is that right?

A Yes.

Q And that is without reservation, I take it, with respect to any of the numbers that were produced by the Bortz Study, any of the results?

A Well, that's an answer which reflects my

that no, it should not, is that right?

A Well, I don't think in toto, no, it should not. I'm saying that the Bortz Survey may not take the seller's perspective and indeed in past proceedings involving these copyright allocations there's been questions about taking the seller's perspective.

What I'm saying is, however, that for most of the categories and particularly for the Joint Sports Claimants, there's no reason to be concerned about that. There may be -- you may want to adjust in some ways and I think one example would be the commercial broadcasters and here's where we may disagree.

Q That's a bit later on.

A Yes.

Q I'm going to continue on with things we agree on for a while anyway.

A Okay.

Q You make the point that the buyers in this market have some monopoly -- I'm sorry, some market power. Is that right?

understanding of how the survey was conducted, the survey design and so forth. I am not privy to any particular problems that may have arisen in this room or elsewhere with specific numbers that resulted from the Bortz Study, so I'm not -- I don't have the detailed knowledge of that that other people may have such as Mr. Trautman.

Q So as you sit here, you have no reason not to recommend that the Panel follow the Bortz survey results with respect to all of the categories measured by the Bortz Survey?

A I have no reason to believe that the Bortz Survey should not be followed, that's correct.

Q And I agree with you on that, Dr. Crandall. This is really going quite well so far.

A Okay.

Q On the next page of your testimony, you talk about, you address the question of whether the Bortz Survey results should be adjusted to reflect the seller side considerations. Do you see that?

A Yes.

Q And would you explain -- your answer is

A Traditionally, the buyers being the cable systems have been found to have market power in the multi-channel video programming market, yes.

Q And that derives in significant measure from the fact that typically or historically, let's start with that, they have been the only providers of multi-channel video programming in local markets, is that right?

A Well, derives from the fact that typically there's only one. There are over builders and increasing number of over builders today, but still, it is still, I think, widely considered that the cable systems still have some market power.

Q And that was the case in 1998 and 1999, correct?

A Yes.

Q Do you have a sense of what percentage of cable markets had cable overbuild competition?

A In 1998 and 1999?

Q Yes.

A I have not looked at that. There's always been some, but then with the 1996 Telecommunications

<p style="text-align: right;">Page 10101</p> <p>1 Act, some new local telecommunications companies came 2 in and built Fiberco- networks, RCN, in particular, so 3 there's been an increase in it. But I have no idea 4 what the extent was in 1998 and 1999 or how far it's 5 gone today.</p> <p>6 Q Can we assume for purposes of this 7 discussion that, in fact, in 1998 and 1999 cable 8 operators, due to the fact that in most markets they 9 still were the only provider of multi-channel video 10 programming, did that have type of market power?</p> <p>11 A Well, they weren't the only supplier 12 multi-channel video programming. They obviously were 13 a direct broadcast satellite providers, so there were 14 only the sole supplier in areas that couldn't, didn't 15 have a direct view of satellites.</p> <p>16 Q Turn to Appendix 1, please.</p> <p>17 JUDGE VON KANN: Dr. Crandall, what does 18 the phrase "over builders" mean?</p> <p>19 THE WITNESS: It's a term that grew up in 20 the cable business to, I guess, probably among cable 21 companies themselves, it's a pejorative. For those 22 companies that would come in and build cable systems</p>	<p style="text-align: right;">Page 10103</p> <p>1 market power and buyers who have market power. The 2 sellers being monopolists, the buyers being 3 monopsonists.</p> <p>4 Q All right, and again --</p> <p>5 JUDGE VON KANN: What does that last term 6 mean?</p> <p>7 THE WITNESS: A single buyer, rather than 8 a single seller.</p> <p>9 JUDGE VON KANN: All right.</p> <p>10 BY MR. STEWART:</p> <p>11 Q And you present them because of your 12 premise that in 1998 and 1999, if one were seeking to 13 replicate a market place in the sale of distant signal 14 programs one would have to account for monopsony power 15 on the buyer side?</p> <p>16 A Well, there's a great deal of discussion 17 of what the marketplace would look like in this 18 proceeding, understandably. And to the extent, the 19 point of my testimony in this appendix, the extent 20 that the buyers had market power, the sellers would 21 probably organize to the extent they were permitted to 22 do so under the antitrust laws to provide the</p>
<p style="text-align: right;">Page 10102</p> <p>1 over the plant, right past the plant of another 2 existing cable system. So they were called over 3 builders rather than those people who are building in 4 discrete ne areas where there was no cable service.</p> <p>5 JUDGE VON KANN: Okay.</p> <p>6 JUDGE YOUNG: They would have to get a 7 franchise from a locality, right?</p> <p>8 THE WITNESS: Yes, but I think, my memory 9 is a little hazy on this, but under the 1984 Act, I 10 think the ability of the municipality to deny them 11 that was greatly reduced.</p> <p>12 In years past, the municipalities could 13 restrict entry, but I think with the 1984 Act, their 14 ability to do so was essentially eliminated.</p> <p>15 BY MR. STEWART:</p> <p>16 Q Are you at Appendix 1 of your testimony?</p> <p>17 A Yes, I am.</p> <p>18 Q Would you describe just briefly what this 19 several pages discusses?</p> <p>20 A Well, this is a discussion of the 21 indeterminacy, if you will, of the situation of 22 bilateral monopoly where there are sellers who have</p>	<p style="text-align: right;">Page 10104</p> <p>1 countervailing power and the economists would expect 2 people to attempt to, people on the other side of the 3 market to attempt to organize in a way to offset the 4 market power of the people they face.</p> <p>5 Q Looking at the chart on page 15, figure 2. 6 First of all, it looks to me like there's a 7 misprinting there, the shaded area appears in my copy 8 anyway as a rectangle.</p> <p>9 A It's a rectangle and actually a trapezoid, 10 right, shaded area, right.</p> <p>11 Q Well, you intended to shade only the area 12 between, bounded by B, C, C prime, B prime, right?</p> <p>13 A Right.</p> <p>14 Q My copy has got the corners shaded as 15 well.</p> <p>16 A Bounded -- I'm not sure what you're 17 talking -- the whole area, B prime, C prime, C, B, it 18 was not rectangular.</p> <p>19 Q Right. Fair enough if the trapezoid is 20 all that we're talking about, then it's mind that's 21 somehow --</p> <p>22 MR. GARRETT: Mr. Winters' copy is not</p>

1 shaded at all. We have graduate students put these
2 things together.

3 (Laughter.)

4 JUDGE VON KANN: On the West Coast?

5 MR. GARRETT: I apologize because it
6 obviously should all be uniform. I have no idea why
7 it's not and we will endeavor to get copies to
8 everyone to ensure that they're all uniform and I hope
9 this cuts down on Mr. Stewart's three hours of cross
10 examination.

11 MR. STEWART: Not a chance, sorry. It
12 makes me wonder what other differences there might be.
13 This may be a PDF version that in fact it's been
14 printed out.

15 By MR. STEWART:

16 Q In any event, you intended to shade that
17 trapezoid?

18 A Yes.

19 Q And that represents the area within which,
20 somewhere within which in the situation that you pose
21 the price and quantity would be settled upon, correct?

22 A Yes, where either the buyer offers a price

1 the total cost would be, that would be the optimal
2 solution.

3 Q Well, under your supposition we wouldn't
4 get to that quantity off to the right. The
5 negotiation would slide the price and quantity
6 somewhere within the trapezoid?

7 A This is not so much my supposition. This
8 is the standard economic theory of bilateral monopoly
9 where someone calls out a price. One side calls out
10 a price and the other one responds to it, it's going
11 to be in that range, but if they could get together
12 and say look, let's figure out what maximizes our
13 joint profits, they would do something different.

14 Q And in this example, where is the Bortz
15 Survey result?

16 A Well, the Bortz Survey result is somewhere
17 in there. You don't know at this point exactly what
18 the final institutions would be, but what we're saying
19 is that the Bortz Survey would be somewhere -- I'm
20 saying the Bortz Survey would be somewhere in that
21 area there.

22 MR. GARRETT: I'm sorry, just so the

1 or the seller would attempt to offer a price,
2 independently.

3 Q And the intersection of the two lines off
4 to the right there with the letters Pa to the right of
5 it?

6 A Yes.

7 Q That intersection is the -- would be an
8 equilibrium price, is that right, and quantity?

9 A Well, that intersection between the MC
10 curve and MRP curve is what you're referring to,
11 right?

12 Q Right.

13 A That would be for quantity, that is the
14 quantity that would drop down from that level, would
15 be the optimal outcome for both sides because -- look
16 at that line C and C prime. As you move to the right
17 from that there is additional gains to the seller
18 which exceeds, I mean to the buyer, which exceeds the
19 cost to the seller.

20 So if they could agree to an all or
21 nothing deal, saying we'll agree to the quantity which
22 comes down from that level and then argue about what

1 record is clear, when you say "in that area", which
2 area?

3 THE WITNESS: The area in the trapezoid or
4 even out to -- it is even indeed possible, if you were
5 to have collectives negotiating that it would all the
6 way out to that intersection that you've dubbed P(a)
7 there to the left of P(a).

8 BY MR. STEWART:

9 Q Now on the seller's side, with respect to
10 the Sports Claimants, there is some degree of
11 collective bargaining strength that is provided by the
12 Sports Broadcasting Act's exemption from antitrust
13 laws of certain of the sports leagues. Is that right?

14 A Well, I guess arguably they can at least
15 organize collectively. Whether this gives them any
16 power over price is another issue that I haven't
17 looked at.

18 Q I thought we discussed that in your prior
19 visit here.

20 A I don't recall what I said, but it is
21 possible that that could give them some power.

22 Q If other program category claimant groups

<p style="text-align: right;">Page 10109</p> <p>1 were able to sell collectively to the same extent then 2 that would equalize whatever influence that had on 3 market power, is that right? 4 A We know if whether or not it would 5 equalize it. If, in fact, a large group of Program 6 Suppliers were to bargain collectively, be allowed to 7 bargain collectively and the cable systems have no 8 alternatives, those people may be in a superior 9 position actually, the cable companies. After all, 10 the collective programs, the collective of Program 11 Suppliers have alternatives. That is, they have their 12 broadcast satellite companies that can negotiate. 13 Q And I wasn't clear in my question. I was 14 not talking about equalizing the negotiation between 15 the sellers and the buyers, but equalizing the effect 16 of market power across various groups of sellers? 17 A Well, even that you can't be sure because 18 it may well be that, in fact, there is not that much 19 competition between say baseball and football, so that 20 the combination of the two in the Joint Sports 21 Claimants represented by counsel here may not add 22 anything to their bargaining power, whereas combining</p>	<p style="text-align: right;">Page 10111</p> <p>1 stations? 2 A Yes, but WGN is a super station and TBS of 3 course, as you know in this proceeding, is now a cable 4 network. All I'm saying is that in the broadcast 5 carriage, the local station undoubtedly does not view 6 a distant baseball team as a substitute for it's local 7 team. 8 Q Now looking at national rights and we 9 talked a bit about the NFL which bargains with 10 national broadcast entities on behalf of the entire 11 league, that is, you don't have football teams 12 competing for the sale of national broadcast rights 13 for their games, correct? 14 A That, I believe, is correct. 15 Q And I believe we discussed the 16 implications of that a bit in your direct. 17 Turning to page 16 of your testimony, I 18 think your concluding sentence there, "it is not 19 reasonable to assume that selling power of the distant 20 signal copyright holders is a sufficient condition for 21 supra competitive prices." Do you see that? 22 A Yes.</p>
<p style="text-align: right;">Page 10110</p> <p>1 let's say all the motion picture companies and those 2 who supply syndicated programming might, if in fact, 3 those are programs for which they are not in the eyes 4 of the cable company reasonable substitutes. 5 Q But combining all of the baseballs teams 6 as is done pursuant to the Sports Broadcasting Act 7 means that the baseball teams aren't competing to sell 8 rights to games to buyers such as cable systems? Is 9 that right? 10 A The -- well, for the purposes of this 11 proceeding, I mean they are indeed -- WGN is competing 12 with TBS in offering services to cable systems and 13 those are competing, are different. I guess even in 14 the same link, competing baseball teams. 15 Q But baseball teams, the Atlanta Braves are 16 not seeking to compete with the Chicago Cubs in 17 selling the rights to WGN to carry the games? 18 A I suppose it's conceivable they could, but 19 it doesn't -- it's not likely to be a very good 20 substitute for Chicagoans to have the Braves replace 21 WGN off the air. 22 Q But WGN and TBS are both national super</p>	<p style="text-align: right;">Page 10112</p> <p>1 Q Is what you mean by that that even to the 2 extent sellers would have power, market power, they 3 still may not be able to achieve prices above 4 competitive levels? 5 A Well, it's a general statement that says - 6 - that's right. That selling power can be offset by 7 buying power, basically, and that therefore you can't 8 conclude anything without knowing something about what 9 the powers on the other side of the table. 10 Q And so as an economic matter, that's why 11 you haven't drawn a point within that shaded trapezoid 12 as to which you would predict the price would settle? 13 A That's correct. We can't even be sure how 14 the institutions will settle out, if in fact, there 15 were no compulsory copyright and there were 16 negotiations, marketplace negotiations among the 17 parties. 18 Q If you were hypothesizing a completely 19 free marketplace, sales of distant signal programs in 20 a completely free marketplace, would you not have to 21 include in that hypothesis in your assumptions that, 22 for example, the NFL teams would be competing with</p>

<p style="text-align: right;">Page 10113</p> <p>1 each other for the sale of broadcast rights? Wouldn't 2 that be an appropriate free market place assumption?</p> <p>3 A Well, one can assume what one wants, but 4 I assume that the intellectual exercise for this 5 purpose is what would happen if we didn't have 6 compulsory copyright, not what would happen if there 7 were not collective organizations among the sellers of 8 copyrighted products.</p> <p>9 I don't see the NFL changing its 10 negotiating approach to broadcast rights because we 11 eliminate the compulsive copyright.</p> <p>12 Q Well, to the extent that, for example, you 13 looked at Program Suppliers and you assume in a 14 hypothetical free marketplace that there would be a 15 marketplace incentive for them to join together and 16 collectively license the syndicated series and movies 17 to these large cable MSOs. Would that be also a fair 18 assumption in terms of replicating a free marketplace?</p> <p>19 A Again, all I'm saying is that there are a 20 large number of possibilities. We know that in years 21 past, attempts to form such a collective were struck 22 down by the Supreme, the 1948 U.S. versus Paramount,</p>	<p style="text-align: right;">Page 10115</p> <p>1 allocate royalties among all of the different program 2 claimant groups, should you not apply the same 3 assumptions to all? And let me be specific.</p> <p>4 If there were an antitrust constraint, a 5 legal constraint against having all of the Program 6 Suppliers joined together and be a single collective 7 for licensing rights, then shouldn't one assume that 8 the same kinds of constraints would apply to the 9 Sports Claimants?</p> <p>10 A I make no such assumptions. I don't know 11 what constraints there would be and I certainly can't 12 sit here and tell you to what extent one group would 13 be able to organize collectively and others would not.</p> <p>14 Q To whatever extent the current marketplace 15 reality with respect to sports leagues reflects 16 legislative exemptions from the antitrust laws that, 17 in effect, take away the constraints that are normally 18 legal protections against higher prices that result 19 from collective licensing, to the extent that that 20 makes a difference in what we see about Sports 21 Claimants today, shouldn't that be somehow backed out 22 of the equation if we're going to treat all of the</p>
<p style="text-align: right;">Page 10114</p> <p>1 et al., right? So it's not necessarily true that that 2 would happen, but all I'm suggesting in my testimony 3 is that various collectives might organize to the 4 extent that it is possible that just the organization 5 can be difficult and legal for them to do so.</p> <p>6 Q So there are potentially legal constraints 7 in that imaginary marketplace that come from the 8 antitrust laws. Is that what you're saying?</p> <p>9 A Potential ones. I wouldn't claim to sit 10 here and tell you that competing motion picture 11 companies couldn't organize in this hypothetical 12 market to sell their product collectively because 13 obviously the entertainment market has changed a great 14 deal since 1948 in the United States. That was just 15 when television was beginning, as you may recall.</p> <p>16 Q Well, here's what I'm getting at. This 17 proceeding is only about the relative positions of the 18 various subcategories of distant signal programming. 19 You understand that, correct?</p> <p>20 A Yes.</p> <p>21 Q And if you're trying to look at a 22 hypothetical free marketplace that would allow you to</p>	<p style="text-align: right;">Page 10116</p> <p>1 claimant groups equally?</p> <p>2 A I don't think you can possibly do that. I 3 mean by analogy would you suggest that the Federal 4 Communications Commission should change its licensing 5 procedures from commercial broadcasting which, of 6 course, has been highly protectionist for a long time 7 and suggest that they ought to go for competitive 8 local broadcast markets with deintermixture back in 9 the 1950s and so forth?</p> <p>10 I think we're getting into hypotheticals 11 here that are just far beyond what anybody could 12 possibly envision.</p> <p>13 Q So in taking whatever marketplace, current 14 marketplace evidence the Sports Claimants would 15 propose in this proceeding as -- for the Panel to rely 16 on and imagining what a hypothetical marketplace would 17 look like, you don't think it's necessary to make any 18 adjustment for the fact that prices in that 19 marketplace are higher than they would otherwise be 20 because of the antitrust law exemptions?</p> <p>21 A I'm not sure I understand fully the 22 prerogatives and the constraints or lack thereof on</p>

<p style="text-align: right;">Page 10117</p> <p>1 this Panel, but it seems to me that would be very 2 difficult to do and I don't see any reason for doing 3 it. It strikes me that we can talk about a 4 marketplace here which would unfold, given various 5 restrictions on competition, including restrictive 6 licensing of broadcast systems, including the Sports 7 Broadcast Act and so forth.</p> <p>8 Q Turning back to page 2 of your testimony 9 and towards the end of paragraph 6.</p> <p>10 A Yes.</p> <p>11 JUDGE VON KANN: Let me ask a question 12 before you move on.</p> <p>13 I think you said a couple of answers ago 14 that it would be very difficult to -- that there are 15 a series of hypothetical eventualities here and it 16 would be very difficult for anybody, including the 17 three of us to say with great certainty exactly how 18 this would play out in the hypothetical marketplace if 19 the compulsory license were removed which is a view 20 that I share. I think it's very difficult to make 21 those predictions.</p> <p>22 Does that suggest that, for example, it</p>	<p style="text-align: right;">Page 10119</p> <p>1 hate to be in your shoes, even as an economist, to try 2 to figure out the implications of all this, but -- and 3 also, I think you have to be modest about the impact 4 of all of this.</p> <p>5 We're talking about a proceeding which, a 6 s I understand it, involves \$100 million, \$120 million 7 a year and changing the institutions or the legal 8 institutions over how these fees are paid which may 9 lead to an increase in the total copyright royalty 10 revenues. Nonetheless, it's a very small share of the 11 total markets effective year where there are 12 broadcasters, people who sell music, people who sell 13 motion pictures, people who sell syndicated program, 14 people who sell -- who are involved in sports. 15 Changing this institution isn't going to cause a 16 wholesale change in the organization of these 17 industries.</p> <p>18 Now they might, in some cases organize 19 collectively for the purpose of negotiating with one 20 or another party in this proceeding. I think it's 21 very difficult to figure out how all of that would 22 settle out.</p>
<p style="text-align: right;">Page 10118</p> <p>1 would probably not be appropriate for us to suppose 2 that in this hypothetical marketplace one of the 3 copyright hold groups would be able to organize and 4 negotiate collectively whereas others couldn't and 5 therefore one copyright holder is going to be a 6 stronger force in this marketplace than another?</p> <p>7 I think you said that you don't know for 8 sure whether, given the way the entertainment industry 9 is today the Program Suppliers would or wouldn't run 10 into antitrust problems if they try to form a 11 collective. I guess we have some amount of collective 12 on the sports side. I suppose we have or could have 13 it on the broadcasters' side.</p> <p>14 I guess Public Television isn't exactly in 15 that, but it seems to me maybe a consequence of what 16 you've said is it would not be appropriate for the 17 Panel to say well as between these different copyright 18 holders, it's obvious to us that A is going to be able 19 to organize and bargain collectively and will 20 therefore be a much stronger force in this marketplace 21 than B who can't.</p> <p>22 THE WITNESS: You can do that, but I would</p>	<p style="text-align: right;">Page 10120</p> <p>1 JUDGE VON KANN: I do too. And does that 2 also -- would you think that would also apply, it 3 seems to me, to the buyer's whether or not all the 4 cable systems in the country could organize a single 5 collective or group of collectives for negotiating 6 with the copyright holders without running into 7 antitrust problems I think is a little unpredictable 8 and difficult to be sure of.</p> <p>9 THE WITNESS: I think what's going on on 10 Capitol Hill at this very moment, the political 11 problems, you probably would precede their antitrust 12 problems if they tried to do that given the media 13 ownership problem.</p> <p>14 JUDGE VON KANN: Okay.</p> <p>15 BY MR. STEWART:</p> <p>16 Q And two-thirds of the way down, paragraph 17 6, you say "hence, as I demonstrate in Appendix 1", do 18 you see that?</p> <p>19 A Yes.</p> <p>20 Q And again, Appendix 1 was a description 21 and a demonstration of how even if there were some 22 degree of market power on the seller side, there would</p>

<p style="text-align: right;">Page 10121</p> <p>1 be a countervailing, potentially a countervailing</p> <p>2 effect on the buyer's side which is well rooted in</p> <p>3 actual fact, that is the cable systems and cable MSOs</p> <p>4 as buyers might well be assumed to have some market</p> <p>5 power, is that right?</p> <p>6 A Well, that's another subject. You asked</p> <p>7 me earlier about cable system's market power as seller</p> <p>8 of services in their markets.</p> <p>9 Q Correct.</p> <p>10 A As buyers of programming, if they were to</p> <p>11 organize in toto as a cable industry collective and</p> <p>12 tried to buy their programming that way, yes, they</p> <p>13 would probably have market power. I doubt that</p> <p>14 either, as you mentioned earlier, the politics or</p> <p>15 perhaps antitrust law would allow that to happen.</p> <p>16 Q Going on in this sentence, you say "hence,</p> <p>17 as I demonstrate in Appendix 1, even if copyright</p> <p>18 holders were able to restrict supply on distant</p> <p>19 signals, there's no reason to believe that cable</p> <p>20 system operators would spend more or less in absolute</p> <p>21 terms on any programming category than their Bortz</p> <p>22 implied share."</p>	<p style="text-align: right;">Page 10123</p> <p>1 approaches a very similar question the one the Bortz</p> <p>2 Survey does but from different data and analytical</p> <p>3 perspective, is that fair?</p> <p>4 A Yes.</p> <p>5 Q See, we can agree on that also.</p> <p>6 MR. GARRETT: I wouldn't push your luck.</p> <p>7 (Laughter.)</p> <p>8 BY MR. STEWART:</p> <p>9 Q We're about to move on here. On page 4</p> <p>10 you talk about, you say the Rosston approach provides</p> <p>11 a range of results. Is that right?</p> <p>12 A Page 4, yes.</p> <p>13 Q And the range you're talking about and</p> <p>14 specifically what you present in that table 1 are</p> <p>15 different results when you look at just the 1998 data</p> <p>16 and just the 1999 data, is that right?</p> <p>17 A On that page, yes.</p> <p>18 Q And I see. And the range also includes</p> <p>19 something we'll talk about next which is the greater</p> <p>20 than zero DSE versus the greater than or equal to 1</p> <p>21 DSE systems?</p> <p>22 A Okay.</p>
<p style="text-align: right;">Page 10122</p> <p>1 Do you see that?</p> <p>2 A Yes.</p> <p>3 Q Do you stand by that?</p> <p>4 A What I'm saying is it's indeterminate.</p> <p>5 That is it could be higher, it could be lower, but we</p> <p>6 don't have -- I have no reason to believe that it</p> <p>7 would break one way or the other.</p> <p>8 Q Now we're back to where you and I agree.</p> <p>9 (Laughter.)</p> <p>10 A Okay.</p> <p>11 Q Let's turn the page. Page 3 you talk</p> <p>12 about Dr. Rosston's regression analysis?</p> <p>13 A Right.</p> <p>14 Q Looking at paragraph 9, you actually say</p> <p>15 that the Rosston regression analysis is corroborative</p> <p>16 or supports the Bortz results. Is that right?</p> <p>17 A I'm saying that for particularly the Joint</p> <p>18 Sports Claimants the numbers come out fairly close and</p> <p>19 in fact, I point out that they come out within 95</p> <p>20 percent confidence interval on Dr. Rosston's results,</p> <p>21 yes.</p> <p>22 Q And Dr. Rosston's regression analysis</p>	<p style="text-align: right;">Page 10124</p> <p>1 Q Anything else?</p> <p>2 A That's all I believe I've addressed in</p> <p>3 here. I haven't attempted to test his results in</p> <p>4 other ways.</p> <p>5 Q Have you read the testimony of Dr. Frankel</p> <p>6 on behalf of the Program Suppliers Claimants in this</p> <p>7 proceeding?</p> <p>8 A You'll have to remind me which one that</p> <p>9 is.</p> <p>10 Q He is the statistician who, among other</p> <p>11 things, looked at what happened to the coefficients</p> <p>12 when you took subscribers out or you put receipts in</p> <p>13 or you did a --</p> <p>14 A I have not looked at that, I'm sorry.</p> <p>15 Q So you're not referring to his testimony</p> <p>16 or his points when you talk about the range of</p> <p>17 results?</p> <p>18 A No. I'm talking about separate estimates</p> <p>19 that I did for 1998 and 1999 and also separate results</p> <p>20 which were reported in part by Dr. Rosston for DSE</p> <p>21 greater than zero or DSE greater than or equal to 1.</p> <p>22 Q Now looking first at the 1998 versus 1999</p>

<p style="text-align: right;">Page 10125</p> <p>1 calculations. Basically what you did was to divide</p> <p>2 the 7,529 observations into those that occurred in the</p> <p>3 two accounting periods in 1998 and those that occurred</p> <p>4 in the two accounting periods of 1999. And just run</p> <p>5 the exact same regression on those two subsets of the</p> <p>6 data?</p> <p>7 A Yes, of course there will be a change in</p> <p>8 those dummy variables to indicate to time period.</p> <p>9 Q That's right because Dr. Rosston's</p> <p>10 regression did include variables that were intended to</p> <p>11 measure the extent to which changes over time or the</p> <p>12 actual accounting period that was in the study</p> <p>13 affected the royalties. Is that right?</p> <p>14 A Yes.</p> <p>15 Q And his results reported some coefficients</p> <p>16 for those time variables, right?</p> <p>17 A Yes, his time dummies, yes.</p> <p>18 Q How are you suggesting in your analysis of</p> <p>19 these two separate subsets that there was a change</p> <p>20 that occurred between the two years?</p> <p>21 A Yes, when I ran those things separately,</p> <p>22 and performed a statistical test, I was unable to</p>	<p style="text-align: right;">Page 10127</p> <p>1 this is a standard econometric test to determine</p> <p>2 whether you should estimate this thing over the entire</p> <p>3 domain of the sample or whether there's been a shift</p> <p>4 in the relationship between different syndromes of the</p> <p>5 same.</p> <p>6 Q It would actually work out if</p> <p>7 you applied the commercial TV percentage you've</p> <p>8 measured here for 1998 and the one you've measured for</p> <p>9 1999, that the percentage of the total royalties for</p> <p>10 those two years for commercial television would be</p> <p>11 higher than the combined results that Dr. Rosston</p> <p>12 presented?</p> <p>13 A I'm sorry, you'll have to ask that</p> <p>14 question again.</p> <p>15 Q The Fund was roughly the same in both</p> <p>16 years if you just take the average of your two</p> <p>17 separate year numbers, you come out with a number</p> <p>18 that's higher than 10.9?</p> <p>19 A For 1998, the number for commercial</p> <p>20 broadcasters for 1999 is not significantly different</p> <p>21 from zero.</p> <p>22 Q But with respect to the point estimate</p>
<p style="text-align: right;">Page 10126</p> <p>1 reject the hypothesis that they really are different</p> <p>2 results, that is there are two separate results that</p> <p>3 are similar in those two years.</p> <p>4 Q Sorry, would you say that again?</p> <p>5 A I'm sorry, when I ran them separately and</p> <p>6 ran the statistical test, the so-called Chow Test on</p> <p>7 them, I was able to reject the hypothesis that they</p> <p>8 were drawn from the same pool, that is, that they were</p> <p>9 subject to the same statistical relationship over the</p> <p>10 two years.</p> <p>11 Q What would be your explanation? Why</p> <p>12 was there a difference, if there was, between the</p> <p>13 relative value of the program categories in 1999</p> <p>14 versus 1998?</p> <p>15 A Well, the conclusion one draws from that</p> <p>16 isn't necessarily that there's a difference in the</p> <p>17 value of programming between those two years, but</p> <p>18 rather that that regression over those two periods to</p> <p>19 come up with an answer. That is there is something</p> <p>20 that is being omitted here that's changing. I don't</p> <p>21 know what it is, but it could be -- there are lot of</p> <p>22 problems of the specification of the regression. But</p>	<p style="text-align: right;">Page 10128</p> <p>1 that results from the running of the regression, that</p> <p>2 is the best estimate of what the share is. Is that</p> <p>3 correct?</p> <p>4 A That's the best estimate, but you cannot</p> <p>5 reject the hypothesis that it is any different from</p> <p>6 zero. So you would not wish to base any decision on</p> <p>7 it.</p> <p>8 Q You talked about --</p> <p>9 JUDGE GULIN: Are you saying that the</p> <p>10 commercial TV share of 8.5 percent is not</p> <p>11 significantly different from zero?</p> <p>12 THE WITNESS: The regression coefficient</p> <p>13 which generates the 8.75 percent estimate is not</p> <p>14 statistically significantly different from zero.</p> <p>15 JUDGE VON KANN: Is that only true with</p> <p>16 respect to commercial TV?</p> <p>17 JUDGE GULIN: You said the Canadian</p> <p>18 coefficient is not so different for 1998 or 1999.</p> <p>19 THE WITNESS: The regressions for 1998 and</p> <p>20 1999 are in appendix three, and those coefficients</p> <p>21 which have no asterisk whatsoever are not</p> <p>22 statistically significant. One asterisk means 10</p>

<p style="text-align: right;">Page 10129</p> <p>1 percent confidence level, two means 5 percent, and 2 three means 1 percent. So that, for instance, in 3 1999, Canadian and commercial TV are not significant. 4 In 1998 Canadian and low power are not significant. 5 BY MR. STEWART: 6 Q Now with respect to your greater than zero 7 versus greater than or equal to one subgroups, on 8 which you ran your analysis, you also ran something 9 called the Wald test to determine whether there was a 10 statistically significant difference between the 11 results you got using one group versus the other. Is 12 that right? 13 A Yes, and that's in footnote seven here. 14 Q I have it in footnote eight. 15 A I have footnote seven. 16 Q I see. It looks like there's another 17 seven back on page five. Is that a footnote? Yes. 18 In my version, it's corrected and it is in footnote 19 eight. But it is the first footnote at the bottom of 20 page six that you're referring to. Is that right? 21 A Yes, and it's a footnote from paragraph 13 22 after the word significant.</p>	<p style="text-align: right;">Page 10131</p> <p>1 And this is the results of the Wald test, 2 run with respect to the 1998 and 1999 tests. 3 A This is the 1998 and 1999? 4 Q Yes. This was not done by me. 5 A Yes. 6 Q And I'm happy to say that I have learned 7 if you turn to the last page and look at the last 8 number you can tell what you need to tell from this. 9 A Yes. 10 Q Okay. You see that where it says 11 probability greater than F equals .955? 12 A Yes. 13 Q And that means that without going through 14 what the null hypothesis is and so on, that means that 15 based on the Wald test, there is no statistically 16 significant difference between the results reported 17 for this 1998 subgroup and the 1999 subgroup. Is that 18 right? 19 A Right. I'm sorry, in my previous answer 20 on the Wald test, the Wald test and the Chow test I 21 ran on the zero and greater than one. I was mistaken 22 on the 1998 and 1999. There was no test run, or if</p>
<p style="text-align: right;">Page 10130</p> <p>1 Q Right. That's where you describe having 2 done the Wald test on those? 3 A Yes. 4 Q Did you do the Wald test with respect to 5 the 1998 and 1999 subtest subgroups? 6 A I just did a Chow test. 7 Q And what did you find? 8 A And found that there is a statistically, 9 I believe and I have to refresh my memory, I think 10 they were statistically different. I can't remember 11 that now. 12 Hang on one second while I look at this. 13 No, I may not have done the Chow. Let me retract 14 that. I don't, at this point, remember if there was 15 a Chow test run to determine whether those two were 16 statistically different. 17 Q I'd like to hand you what I've asked to be 18 marked as 54-RX. 19 (Whereupon, the above-referred 20 to document was marked as NAB 21 98-99 Exhibit 54-RX for 22 identification.)</p>	<p style="text-align: right;">Page 10132</p> <p>1 there was I don't recall what the result was. 2 Q Are you able to read the -- 3 A It will take me, first of all, my training 4 in econometrics goes back quite a few years, as I'm 5 sure you can tell. But I do this sort of work all the 6 time. The problem is the format of these reports 7 differs across statistical packages. But I certainly, 8 in the end analysis, these are always F tests for 9 these sorts of tests and you're quite right. The F 10 test is not statistically significant. 11 MR. GARRETT: I just want to make clear. 12 This was a document -- you're an economist. This is 13 not something we produced. 14 MR. STEWART: That's correct. NERA ran 15 this test at my request, and these were the results. 16 I guess Dr. Crandall, I'd like to give you 17 whatever moments you need to, whatever time you need 18 to review that to see if there are any glaring errors. 19 But would you -- 20 THE WITNESS: It would be very hard to 21 determine from the printout exactly, without the data 22 set, exactly what was done. I presume that what you</p>

<p style="text-align: right;">Page 10133</p> <p>1 told me is correct, namely that the sample was</p> <p>2 bifurcated between 1998 and 1999 and a test was run in</p> <p>3 this fashion, an analysis of variance to determine</p> <p>4 whether in fact there was a shift in structure. And</p> <p>5 you rejected the hypothesis that were was.</p> <p>6 BY MR. STEWART:</p> <p>7 Q The result indicated on the last page of</p> <p>8 this 54-RX implies that there is no statistically</p> <p>9 significant difference between the shares that you</p> <p>10 report when you do the 1998 and 1999 regression</p> <p>11 separately.</p> <p>12 A I believe that is what it says, but I</p> <p>13 would have to look at it and spend some time with it,</p> <p>14 and I could certainly report back.</p> <p>15 Q What the result of the F test says on the</p> <p>16 last page is a conclusion that there's no statistical</p> <p>17 difference, is that right?</p> <p>18 A Depending on what the F test was, yes.</p> <p>19 And now we need to know what the hypothesis being</p> <p>20 tested was and at this point, I can't tell what all is</p> <p>21 going into this. I need to spend some more time with</p> <p>22 it.</p>	<p style="text-align: right;">Page 10135</p> <p>1 But the numbers are what the numbers are and we're</p> <p>2 perfectly happy to do our own check and then see</p> <p>3 whether or not we can submit something here that</p> <p>4 confirms it one way or another.</p> <p>5 But certainly, as Dr. Crandall sits here</p> <p>6 now and even at a break, he is not going to be able to</p> <p>7 verify that Mr. Stewart's econometrician has done all</p> <p>8 of this properly.</p> <p>9 JUDGE VON KANN: That's reasonable.</p> <p>10 MR. STEWART: I guess I would move for the</p> <p>11 admission of 54-RX for impeachment purposes subject to</p> <p>12 check.</p> <p>13 MR. GARRETT: I have no objection to that.</p> <p>14 JUDGE VON KANN: So received.</p> <p>15 (The document, having been</p> <p>16 marked previously for</p> <p>17 identification as NAB 98-99</p> <p>18 Exhibit 54-RX, was received in</p> <p>19 evidence.)</p> <p>20 JUDGE YOUNG: Dr. Crandall, I just want to</p> <p>21 make sure I understand. You separated out the results</p> <p>22 for 1998 and 1999 on the model that dealt with all</p>
<p style="text-align: right;">Page 10134</p> <p>1 Q Well, I would ask that you do that at a</p> <p>2 break, because you ran the Wald test on greater than</p> <p>3 zero, greater than or equal to one, correct?</p> <p>4 A Yes.</p> <p>5 Q And you did that in order to determine</p> <p>6 whether it is a statistically significant difference.</p> <p>7 Right?</p> <p>8 A Yes.</p> <p>9 Q And did you run any such tests on the 1998</p> <p>10 and 1999?</p> <p>11 A That's what I was trying to recall. And</p> <p>12 I don't recall. I thought my recollection was I was</p> <p>13 going to do a Chow test on it. But I'm not sure I</p> <p>14 did.</p> <p>15 Q Well, if you wouldn't mind taking a look</p> <p>16 at this and confirming to the extent that you're able</p> <p>17 that it shows that in fact there's no difference</p> <p>18 between the 1998 and 1999 results I would appreciate</p> <p>19 that.</p> <p>20 MR. GARRETT: I'm happy to accept this</p> <p>21 here, subject to check. I don't know if he's going to</p> <p>22 be able to check all these numbers here in the break.</p>	<p style="text-align: right;">Page 10136</p> <p>1 DSEs over zero. Correct?</p> <p>2 THE WITNESS: Yes, for the entire set.</p> <p>3 JUDGE YOUNG: And you came up with the</p> <p>4 results, and what Mr. Stewart is asking you to do is</p> <p>5 to look at a test that his person performed which</p> <p>6 shows, he says, that there's no significant</p> <p>7 differences between the results that you obtained</p> <p>8 untangling the two years from the combined result. Is</p> <p>9 that what we have here?</p> <p>10 Is he asking you to say that this is --</p> <p>11 there's no significant, statistically significant</p> <p>12 difference between the two years.</p> <p>13 THE WITNESS: The latter is my</p> <p>14 understanding of what he is doing.</p> <p>15 JUDGE YOUNG: Okay. And you've in another</p> <p>16 part of your testimony, figured out the implied</p> <p>17 results, implied share results for DSEs over one and</p> <p>18 you're saying that you did do tests to show there's no</p> <p>19 significant, statistically significant difference</p> <p>20 between the results for the DSEs over one and the DSEs</p> <p>21 over zero?</p> <p>22 THE WITNESS: No, there is a significant</p>

<p style="text-align: right;">Page 10137</p> <p>1 difference.</p> <p>2 JUDGE YOUNG: There is a significant</p> <p>3 difference.</p> <p>4 THE WITNESS: Yes.</p> <p>5 JUDGE VON KANN: Okay, Mr. Stewart?</p> <p>6 BY MR. STEWART:</p> <p>7 Q Dr. Crandall, with respect to your first</p> <p>8 point on pages four and over to the top of five that</p> <p>9 when you run the 1998 and 1999 results separately, the</p> <p>10 Rosston data and model produced -- provide a range of</p> <p>11 results. If it is the case that when you run the Wald</p> <p>12 test there's no statistically significant difference</p> <p>13 between the results from 1998 and 1999, your point</p> <p>14 that the Rosston regression should be discounted</p> <p>15 because it produces a range of results when comparing</p> <p>16 1998 and 1999 is incorrect. Is that right?</p> <p>17 A I think it's, however, the fact that there</p> <p>18 is some variation here, and a rather substantial</p> <p>19 variation including the lack of significance on the</p> <p>20 commercial TV coefficient, there's something more</p> <p>21 we'll want to take into account. It is certainly true</p> <p>22 that there's enough variation here that you cannot</p>	<p style="text-align: right;">Page 10139</p> <p>1 regression thing. But one of the questions of the</p> <p>2 Panel was how should they treat the greater than one</p> <p>3 or equal to one and the greater than zero results.</p> <p>4 Should they average them and so forth? And I conclude</p> <p>5 that surely, at least you should consider the greater</p> <p>6 than equal to one as strongly as you do greater than</p> <p>7 zero. You might even conclude that it's superior, but</p> <p>8 there are problems with the whole Rosston regression</p> <p>9 analysis that I wouldn't suggest that it be relied on</p> <p>10 anyway.</p> <p>11 Q Okay, and I want to make sure we get a</p> <p>12 chance to discuss those reasons separately. But with</p> <p>13 respect to just the greater than zero, greater than or</p> <p>14 equal to one. The greater than or equal to one data</p> <p>15 set represents fewer observations. Is that right?</p> <p>16 A Yes.</p> <p>17 Q Do you know how many fewer?</p> <p>18 A I say in here somewhere. Looks like</p> <p>19 approximately 759.</p> <p>20 Q Now and you say that you're referring to</p> <p>21 paragraph 15 on page 6?</p> <p>22 A Yes.</p>
<p style="text-align: right;">Page 10138</p> <p>1 conclude that the two regressions are statistically</p> <p>2 significantly different.</p> <p>3 Q Next, lets look at your discussion of the</p> <p>4 greater than zero and greater than or equal to one</p> <p>5 starting on page five of your testimony.</p> <p>6 A Yes.</p> <p>7 Q And I guess your conclusion over on the</p> <p>8 top of page seven is that the panel should give no</p> <p>9 less weight to the greater than or equal to one DSE</p> <p>10 model than to the one presented by Dr. Rosston. Is</p> <p>11 that right?</p> <p>12 A That's what I say. Yes.</p> <p>13 Q And why do you say it should be given no</p> <p>14 less weight?</p> <p>15 A Well, that's a conservative way of saying</p> <p>16 that at least you don't give it less weight. That you</p> <p>17 simply don't rely solely on the DSE greater than zero</p> <p>18 estimate.</p> <p>19 Q You don't rely solely on it?</p> <p>20 A Right, if you're to rely at all. Keep in</p> <p>21 mind that this is against the background which I think</p> <p>22 there's significant problems with the whole Rosston</p>	<p style="text-align: right;">Page 10140</p> <p>1 Q You respond to Dr. Rosston's suggestion</p> <p>2 during his testimony that it's better in a multiple</p> <p>3 regression to use the data set that provide data so</p> <p>4 that you can, because multiple regressions are</p> <p>5 designed to tease out and extract the relationship</p> <p>6 among the variables. So the more data you have, the</p> <p>7 better it is and as a general matter. You agree with</p> <p>8 that proposition as a general matter?</p> <p>9 A As a general matter, yes. You can get --</p> <p>10 it is probably better to have more observations since</p> <p>11 you can draw, you are more likely to obtain</p> <p>12 statistically significant results.</p> <p>13 Q Okay. And in fact, you then went on to</p> <p>14 apply the Wald test in this context and find that</p> <p>15 there was a statistically significant difference</p> <p>16 between the two versions, right?</p> <p>17 A Yes.</p> <p>18 Q And in fact, we know that the coefficients</p> <p>19 measured in the greater than zero, the bigger data</p> <p>20 set, 7,529 is what it was, produces tighter confidence</p> <p>21 intervals. That is more precise coefficient</p> <p>22 measurements. Is that right?</p>

<p style="text-align: right;">Page 10141</p> <p>1 A I don't recall whether that is generally 2 true or whether the goodness of fit is better in 3 general. I don't know. I don't remember. We could 4 look at it. 5 Q Dr. Rosston actually testified that the 6 coefficients were tighter or more precisely estimated 7 when you used the big data set, use all of the data 8 available to you. 9 A All of the coefficients? 10 Q That are greater than zero. I don't know. 11 A I wouldn't be surprised about that. 12 Q It's in the record, right? Dr. Rosston 13 presented the coefficients at confidence intervals for 14 both of these data sets in his direct testimony, 15 correct? 16 A That's my recollection. I don't have his 17 testimony in front of me. 18 Q So let's proceed from that assumption that 19 the coefficients measured with the complete data set 20 were more precisely measured. You have shown that in 21 fact, when you add the extra 759, when you consider 22 the extra 759 observations, you get a measure that is</p>	<p style="text-align: right;">Page 10143</p> <p>1 than zero to the one and more. And the reason for 2 this is that there is no price in the regression. And 3 the copyright rate, under the compulsory license 4 scheme is changing as you go from zero to one to one 5 and a fraction and so forth. And there's no 6 independent variable factoring the copyright fee, your 7 royalty rate. 8 Q Let me just make sure we're clear on this. 9 Your statement there, the second sentence of paragraph 10 15 says the marginal information gleaned from the 11 extra 759 observations is likely small. Do you see 12 that? 13 A Yes. 14 Q You've gone the next step and measured the 15 difference provided by the marginal information 16 gleaned from the extra 759 observations, and you have 17 shown, you've demonstrated that it is statistically 18 significant. 19 A But they are different. That is the two 20 regressions run on subsets of the same data set give 21 you statistically different results. So how are you 22 going to chose between them?</p>
<p style="text-align: right;">Page 10142</p> <p>1 statistically different from the one where you use 2 only part of your observations. And just as a general 3 matter, from an econometrics perspective, wouldn't the 4 broader data set be superior? 5 A I might do something else though. I might 6 look and see what is the relationship for those 759 7 observations. And when you run the Rosston regression 8 on those alone, you get very poor results. 9 Q I want to get to that. But your statement 10 that Dr. Rosston's argument is unpersuasive because 11 the marginal information gleaned from the extra 759 12 observations is likely small, is actually disproved by 13 you when you run the Wald test. Right? 14 A You get different results. The 15 improvement in the goodness of fit is maybe offset by 16 the fact that in fact you have two very separate 17 samples in which your relationship is quite different. 18 I haven't looked at the tightness of fit of the 19 regression coefficients and we should go over that, if 20 you want to discuss it. 21 But what I'm finding here is that the 22 relationship is different as you move from the greater</p>	<p style="text-align: right;">Page 10144</p> <p>1 Q Including the marginal information gleaned 2 from the extra 759 observations, may be small from a 3 colloquial perspective, but from a statistical 4 perspective it is big enough to be significant, 5 correct? 6 A Well, it has a significant effect on the 7 estimation suggesting that those 759, the relationship 8 among those 759 is different among the rest of them 9 and therefore shouldn't be in the same regression. 10 Q And that is what you lay out in your 11 Appendix Two? 12 A Yes. 13 Q Would you explain what that Appendix Two 14 is? 15 A Appendix Two runs a regression, Rosston 16 regression, over the entire domain of the variables 17 but includes a dummy variable indicated for carriage 18 of one or more DSEs and then interacts that dummy 19 variable with each of the programming types. And then 20 asks the question for whether the Wald test is done of 21 whether the results are statistically different when 22 the one or more DSE variable is zero, i.e. they are</p>

<p style="text-align: right;">Page 10145</p> <p>1 not carrying one or more DSEs, and the interaction of</p> <p>2 that dummy variable with the programming variables are</p> <p>3 all zero. And the Wald test on that as you see, those</p> <p>4 2.39 which is statistically significant, or the 2.6</p> <p>5 percent probability or confidence level.</p> <p>6 Q We're on page 18, the last number there.</p> <p>7 Probability, prob greater than F equals 0.026?</p> <p>8 A Right.</p> <p>9 Q And that's the same format as in exhibit -</p> <p>10 -</p> <p>11 A It is a similar test to the one, yes, that</p> <p>12 you showed in the other one.</p> <p>13 JUDGE VON KANN: Dr. Crandall, let Mr.</p> <p>14 Stewart finish the questions so it makes for cleaner</p> <p>15 transcript. We can know what your answer is.</p> <p>16 THE WITNESS: Sorry.</p> <p>17 BY MR. STEWART:</p> <p>18 Q And it is because of the fact that the</p> <p>19 probability of greater than F shown on the last page</p> <p>20 of 54-RX is close to 1.955 that you can conclude from</p> <p>21 a statistical analysis perspective that there was no</p> <p>22 significant difference between 1998 and 1999 here</p>	<p style="text-align: right;">Page 10147</p> <p>1 A Once you move above one, then the cable</p> <p>2 system actually has to pay something in addition and</p> <p>3 therefore has a higher marginal price for the signals</p> <p>4 which contribute to DSEs greater than one.</p> <p>5 Q Now cable systems that have say 0.5 DSEs,</p> <p>6 provide some information about the fact that they've</p> <p>7 only distant signals that get them 0.5 DSEs, right?</p> <p>8 That is, they haven't bought the next DSE that takes</p> <p>9 them over one. Is that right?</p> <p>10 A That is correct.</p> <p>11 Q Okay. And the particular distant signals</p> <p>12 that they have selected, with the programming on those</p> <p>13 distant signals, provides some evidence, because of</p> <p>14 the fact that they're actually paid for by the cable</p> <p>15 operator about royalties that those cable operators</p> <p>16 pay in single programs, correct?</p> <p>17 A I don't quite understand your question.</p> <p>18 Could you repeat it? I'm sorry.</p> <p>19 Q Those cable operators did -- are paying</p> <p>20 royalties for those distant signal programs that they</p> <p>21 carry, is that right? They've selected those</p> <p>22 particular ones?</p>
<p style="text-align: right;">Page 10146</p> <p>1 because the number is small, not close to one. You</p> <p>2 conclude that there is a statistically significant</p> <p>3 difference between the two runs of the regression?</p> <p>4 A Yes, that is a probability level for</p> <p>5 rejecting or accepting the hypothesis of equality.</p> <p>6 Q Now you say back on page six that when you</p> <p>7 conclude the system of DSEs between, I'm sorry, the</p> <p>8 positive DSEs less than one, combined some signals</p> <p>9 that were purchased at higher prices implying higher</p> <p>10 marginal values. Do you see that? Towards the end.</p> <p>11 A Yes.</p> <p>12 Q What do you mean by that?</p> <p>13 A Let me read the whole thing.</p> <p>14 (Pause.)</p> <p>15 Well, under the current structure of the</p> <p>16 compulsory copyright, everyone must pay for at least</p> <p>17 one DSE. So those people that are in that group of</p> <p>18 greater than zero, but less than or equal to one, are</p> <p>19 paying nothing for an incremental signal.</p> <p>20 Q At least in the royalty rate. Are those</p> <p>21 the ones at which you would say that there's an</p> <p>22 implication of higher marginal values?</p>	<p style="text-align: right;">Page 10148</p> <p>1 A They're paying for one DSE whether they</p> <p>2 select those or not. Therefore, the marginal cost of</p> <p>3 selecting 0.25 or 0.5, in your example, is zero.</p> <p>4 Q Is that the actual total marginal cost?</p> <p>5 A Well, the marginal rate is zero. If, in</p> <p>6 fact, they raise the price of basic service or they</p> <p>7 obtain more subscribers, then they will have to pay</p> <p>8 some incremental royalty rate. But if we were looking</p> <p>9 into signal for which they actually paid money, that</p> <p>10 is over and above one, there they're paying not only</p> <p>11 for any enhanced subscriptions, any potential increase</p> <p>12 in the basic rate if they can make one, but also</p> <p>13 they're paying higher copyright rate.</p> <p>14 Q So, with respect to the first point you</p> <p>15 made, you agree with Dr. Rosston to the extent distant</p> <p>16 signals picked up by cable operators that don't total</p> <p>17 one DSE increase the number of subscribers they are</p> <p>18 able to attract or allow them to increase their</p> <p>19 subscription fee, then the carriage of those distant</p> <p>20 signals does produce an increase in the actual royalty</p> <p>21 amounts that are paid as opposed to the rate?</p> <p>22 A For that to be true, yes, your</p>

<p style="text-align: right;">Page 10149</p> <p>1 hypothetical would be correct. However, when one 2 estimates the Rosston regression over just those cable 3 systems that paid between zero and greater than zero 4 DSEs and less than one, that is, those excluded 5 observations we were talking about earlier, it is 6 impossible to find a statistically significant 7 coefficient on most of the programming categories. 8 Indeed, I think one of them, Devotionals, comes out 9 negative. And only Program Suppliers comes out 10 statistically significantly positive. 11 So there seems to be in that range very 12 little effect in his sample, subscribers or at least 13 something that is generating an increase in royalty 14 payments, since that is his dependent variable. 15 Q You're aware, are you not, that there is 16 a significant number, there was a significant number 17 in 1998 and 1999 of Form Three cable operators who pay 18 the minimum fee and don't carry any distant signals, 19 right? 20 A Yes. 21 Q And what would be your explanation for 22 that phenomenon?</p>	<p style="text-align: right;">Page 10151</p> <p>1 uses of that channel. Correct? 2 A It represents a choice by him and indeed 3 economics certainly must enter into it. I mean, 4 politics could enter into it, too. There may be some 5 reasons in the local politics for importing certain 6 signals because of the relationship with the 7 franchising authority. I don't know, but I would 8 generally expect some effect on his bottom line from 9 importing a distant signal. 10 What I'm telling you is that in the 11 regression analysis of Rosston, which I'm trying to 12 explain here, there doesn't seem to be one for the 13 most part. 14 MR. STEWART: This would be an appropriate 15 time for a break. 16 JUDGE VON KANN: Sure. Let's take 15 17 minutes. 18 (Whereupon, the proceedings went off the 19 record at 11:00 a.m. and resumed at 11:19 a.m.) 20 JUDGE YOUNG: Dr. Crandall, on page 6, in 21 paragraph 14, you say, "If the panel was implying to 22 consider both models, it should consider them both</p>
<p style="text-align: right;">Page 10150</p> <p>1 A They make programming choices that they 2 think are better. Or they have alternatives that are 3 better than importing a distant signal. 4 Q One reminds that the point you're making 5 earlier about the relative significance of this 6 distant signal marketplace to the businesses of the 7 various groups represented here. In the cable 8 industry a distant signal, the channels occupied by 9 distant signals are relatively a very small part of 10 the service offered by the cable operators. Correct? 11 A Relatively small in terms of the 12 proportion of channels you mean? 13 Q Yes. 14 A I think that is true. Yes. 15 Q And the cable operators are driven by 16 maximizing their profits across the services that they 17 provide. Correct? 18 A Certainly. 19 Q And so the decision to carry a distant 20 signal, even if it doesn't get up to the level of 21 matching 1.0 DSEs, represents an economic choice by 22 the cable operator with respect to his alternative</p>	<p style="text-align: right;">Page 10152</p> <p>1 equally." What do you mean by that? 2 THE WITNESS: Well, the problem here, as 3 I was beginning to explain to Mr. Stewart, is that 4 it's difficult because of the problems with the 5 general model to determine which is the superior 6 approach to predicting supposed programming values 7 here, whether it is using all of those between greater 8 than zero or just those greater than or equal to one. 9 JUDGE YOUNG: Assume we buy that. And 10 then we want to try to see what you ask us to do or 11 you suggest we do. 12 THE WITNESS: Well, there is no 13 mathematical formula I can suggest to you. What I do 14 say, though, is that you shouldn't average the two 15 because one is a subset of the other. 16 And then I have given you some evidence 17 today that -- and those signals that are in the DSE 18 greater than zero but not in the sample for DSE 19 greater than or equal to one, that the model doesn't 20 do very well. I mean, my preferences would clearly be 21 for the greater than, equal to one category. 22 But I have problems with the whole</p>

<p style="text-align: right;">Page 10153</p> <p>1 approach. So it is hard for me to recommend that you 2 use one of them.</p> <p>3 JUDGE YOUNG: Okay. Well, I guess that's 4 a good segue back to where you were about to ask 5 questions.</p> <p>6 JUDGE GULIN: Let me follow that. If we 7 were to conclude that this should be given equal 8 value, I understand we can't average them as a 9 mathematical matter because of the overlapping data 10 sets, but we could take the midpoint, not call it an 11 average, right? I am not saying those are the same. 12 It just wouldn't be calling it an average, correct?</p> <p>13 THE WITNESS: Yes. I suppose you could do 14 anything you wish. I am just suggesting that doing 15 the mathematical operation of averaging, there is no 16 basis in the science of all of this for doing that. 17 How you consider them is your judgment.</p> <p>18 MR. GARRETT: Don't tell them they can do 19 anything.</p> <p>20 THE WITNESS: You don't believe they will? 21 BY MR. STEWART: 22 Q Dr. Crandall, turning to pages 8 and 9 of</p>	<p style="text-align: right;">Page 10155</p> <p>1 commercial minutes may be about the same if they were 2 about the same broadcast day. Yet, clearly to the 3 cable operator, the commercial station is of 4 considerably greater value, having paid the 3.75 rate 5 to get it.</p> <p>6 Q First of all, it is the purpose of a 7 multiple regression analysis to look at many 8 observations, correct?</p> <p>9 A Yes.</p> <p>10 Q And to include relevant variables that 11 affect what you are interested in, in this case 12 royalties, correct?</p> <p>13 A Yes.</p> <p>14 Q And it is to observe all of the 15 relationships among all of those variables, among all 16 of those observations, and try to isolate and extract 17 the influence of each of the variables separately, 18 holding all of the other things constant, correct?</p> <p>19 A That's the intent.</p> <p>20 Q In fact, there is no step in which Dr. 21 Rosston's regression credits PBS -- put it this way. 22 For one observation among the 7,529, there's no step</p>
<p style="text-align: right;">Page 10154</p> <p>1 your testimony, here you discuss what you say is a 2 problem with the Rosston regression methodology. Is 3 that right?</p> <p>4 A Yes.</p> <p>5 Q And, in particular, it has to do with the 6 treatment of the 3.75 rate as it relates to PBS 7 signals. Is that right?</p> <p>8 A Yes.</p> <p>9 Q At the top of page 9, you talk about a 10 simple example, which you set up at the bottom of page 11 8. And then at the top of page 9, you describe how 12 Rosston's model would allocate the royalties in this 13 simple example. Is that right?</p> <p>14 A Well, it does not say that Dr. Rosston's 15 model would give you exactly these results, but what 16 it points out is that when you are buying a pool of 17 signals, which includes a PBS signal and a 3.75 18 commercial signal, and then you take the total royalty 19 payment for that combination and relate it to minutes 20 on the commercial signal and minutes on the PBS 21 signal, that it would tend to overstate the value of 22 the PBS minutes because the PBS minutes and the</p>	<p style="text-align: right;">Page 10156</p> <p>1 in which PBS is credited with 50 percent of the 2 royalties here. Is that right?</p> <p>3 A That is correct. It's not precisely 50 4 percent. The point is that it relates this entire 5 payment to two buckets of minutes: PBS minutes and 6 the commercial station minutes.</p> <p>7 Q It relates the entire payment --</p> <p>8 A Right.</p> <p>9 Q -- to each of those buckets or, actually, 10 in your example, three different buckets for that one 11 observation, right?</p> <p>12 A Yes.</p> <p>13 Q And let's just assume also for simplicity 14 that there is another system among the 7,529 that is 15 exactly the same, carries exactly the same 2 signals, 16 but it is in a different market size and, hence, 17 doesn't have to pay 3.75 for the independent station. 18 Okay?</p> <p>19 A Uh-huh.</p> <p>20 Q And if both of those are in the 21 regression, then the regression operates to observe 22 the difference between those two, correct?</p>

<p style="text-align: right;">Page 10157</p> <p>1 A Yes, it would.</p> <p>2 Q In fact, Dr. Rosston's analysis included</p> <p>3 a variable for 3.75 royalty payments, did it not?</p> <p>4 A Yes, it did.</p> <p>5 Q And the purpose of that variable is to</p> <p>6 extract the influence of the 3.75 rate structure on</p> <p>7 the royalties, correct?</p> <p>8 A Yes.</p> <p>9 Q So that if it was properly done, the</p> <p>10 overstatement of the PBS royalties in your</p> <p>11 hypothetical example would be, in effect, stepped up</p> <p>12 by the 3.75 variable and not reflected in the</p> <p>13 coefficient for public broadcasting?</p> <p>14 A Yes, if the effect of 3.75 across all of</p> <p>15 these observations were exactly the same. I doubt it</p> <p>16 is. But also keep in mind my earlier criticism, which</p> <p>17 is that there is no price variable on the right-hand</p> <p>18 side.</p> <p>19 I mean, the way one would typically run a</p> <p>20 regression of this sort is to estimate what DSEs an</p> <p>21 operator would take as a function of the prices he</p> <p>22 would pay and the attributes of those signals.</p>	<p style="text-align: right;">Page 10159</p> <p>1 royalties?</p> <p>2 A Well, if you have price of basic service</p> <p>3 and subscribers times the royalty rate, that's the</p> <p>4 definition. However, I believe, at least the way I</p> <p>5 would approach this and I think many empirical</p> <p>6 economists would approach this, is you would first</p> <p>7 estimate what signals the cable system would take. So</p> <p>8 you would not do a regression of revenues on these</p> <p>9 right-hand side variables, but, rather, you would take</p> <p>10 -- you would do a discreet choice model to be</p> <p>11 appropriate or logit model, taking a choice. What's</p> <p>12 the probability of taking one DSE, 1.25 DSE, and so</p> <p>13 forth, as a function of what is on those signals and</p> <p>14 the price of doing so.</p> <p>15 Q That's an interesting suggestion. Maybe</p> <p>16 I'll try that next time unless we're allowed to rely</p> <p>17 on the Bortz study. If you put in all of the terms</p> <p>18 that define the price, if you put all of the terms in</p> <p>19 that are equivalent to the royalties on the right-hand</p> <p>20 side of the regression, you introduce some</p> <p>21 difficulties because of the co-linearity between or is</p> <p>22 it --</p>
<p style="text-align: right;">Page 10158</p> <p>1 That is not what is being done here.</p> <p>2 Rather, you only have a total royalty payments, on one</p> <p>3 side, and then minutes in all the programming, on the</p> <p>4 other side.</p> <p>5 Q About prices, you mean the DSE rates?</p> <p>6 A It would be -- yes. It would be the DSE</p> <p>7 rates times the -- you have to account for differences</p> <p>8 in the price of the basic service as well, but because</p> <p>9 that multiplies by the DSE rate to give you the price</p> <p>10 of your --</p> <p>11 Q I'm sorry. Are you finished?</p> <p>12 A Yes.</p> <p>13 Q Isn't that just the definition of</p> <p>14 royalties? Isn't that just the formula by which the</p> <p>15 royalties are calculated?</p> <p>16 A Isn't what?</p> <p>17 Q If you put in the subscriber fee and the</p> <p>18 number of subscribers and the DSEs and the DSE rates</p> <p>19 and whether any is the 3.75, that is an effective</p> <p>20 price term that you are talking about, correct?</p> <p>21 A That is correct.</p> <p>22 Q Isn't that just the definition of</p>	<p style="text-align: right;">Page 10160</p> <p>1 A You're estimating the tautology, then,</p> <p>2 yes. You're not estimating anything. That's right.</p> <p>3 If you put P and Q on the left-hand side and P and Q</p> <p>4 on the right-hand side, you're not estimating</p> <p>5 anything.</p> <p>6 Q And going back to the question here you</p> <p>7 have at the top of page 9, it is the case that if you</p> <p>8 assume with me that Dr. Rosston's analysis was run</p> <p>9 correctly, his use of the variable for 3.75 royalties</p> <p>10 should have avoided an over-crediting of the PBS</p> <p>11 royalties in the simple example that you give?</p> <p>12 A I doubt if it would because it's an</p> <p>13 additive variable. And I think it probably would have</p> <p>14 to be multiplicative times the commercial signals.</p> <p>15 There's a real problem with specification here, but my</p> <p>16 problem here is that I don't believe you learn much</p> <p>17 from this kind of a regression.</p> <p>18 Q And that's because you think it needed</p> <p>19 price on the right-hand side as well?</p> <p>20 A It's the whole conceptual model,</p> <p>21 theoretical model, would start with "What does the</p> <p>22 cable guide take?" because you meet his demand</p>

<p style="text-align: right;">Page 10161</p> <p>1 function. And this is a common way of deciding how to</p> <p>2 measure the value of various services. And whether</p> <p>3 it's your choice of travel mode or whether it's the</p> <p>4 cable system's choice of programming, that would be</p> <p>5 the preferred way to go about it.</p> <p>6 Q Well, the data available showed what the</p> <p>7 cable operators actually selected, correct? Those are</p> <p>8 the distant signals they carried?</p> <p>9 A Yes.</p> <p>10 Q And it showed the total amounts they</p> <p>11 actually paid for those distant signal programs that</p> <p>12 they purchased, correct?</p> <p>13 A I believe that's correct. Yes, sir.</p> <p>14 Q And if you were to use this price function</p> <p>15 that you suggested, would you not also introduce the</p> <p>16 potential problem of the difference between the DSE</p> <p>17 structure and the actual relative marketplace value to</p> <p>18 the cable operator?</p> <p>19 A I don't think there's a problem there the</p> <p>20 way I understand your question. What you want to know</p> <p>21 is at the margin, what does it cost them to take, say,</p> <p>22 WGN? And does he take it relative to a variety of</p>	<p style="text-align: right;">Page 10163</p> <p>1 something about the demand, price elasticity, demand</p> <p>2 for gasoline in a market in which taxes are lower or</p> <p>3 taxes don't exist.</p> <p>4 Q The Bortz survey in your view does measure</p> <p>5 those relative values. Is that right?</p> <p>6 A Relative values of what?</p> <p>7 Q The program categories to cable operators.</p> <p>8 A Well, it asks for cable operators, yes, to</p> <p>9 allocate a budget. And, therefore, it must reflect</p> <p>10 his relative assessment of the values.</p> <p>11 Q Okay. Let's turn to your next section E,</p> <p>12 "Rosston's model does not account for the supposed</p> <p>13 seller-side problem." Do you see that?</p> <p>14 A Yes.</p> <p>15 Q Did you use the word "supposed" because</p> <p>16 you think it is not a problem? Is that right?</p> <p>17 A It might have been an injudicious choice</p> <p>18 of word. I should have probably said "alleged" or</p> <p>19 something like that. Because it hasn't been raised</p> <p>20 before, I don't know that anybody has demonstrated</p> <p>21 exactly what the seller-side problem is any detail.</p> <p>22 But it refers back to the history of the supplier side</p>
<p style="text-align: right;">Page 10162</p> <p>1 other choices open to him?</p> <p>2 Q Well, we know what the cable operator paid</p> <p>3 for WGN along with the other signals that he carried,</p> <p>4 correct? That's what's in the Rosston regression?</p> <p>5 A What's in the Rosston regression are his</p> <p>6 total royalties on the left-hand side, which is a</p> <p>7 product of that rate times his basic reference.</p> <p>8 Q If you introduced the variable that</p> <p>9 reflected DSE rate differences between different types</p> <p>10 of signals, for example, you would now be including</p> <p>11 the legislative decisions that went into making the</p> <p>12 statutory rate structure, correct?</p> <p>13 A That's correct.</p> <p>14 Q That's not a marketplace price structure.</p> <p>15 Is that right?</p> <p>16 A That is probably not the price structure</p> <p>17 that would emerge from a fully negotiated -- a market</p> <p>18 in which these rates are freely negotiated, but it</p> <p>19 would tell you a lot about the cable system's demand</p> <p>20 function.</p> <p>21 Just because we tax gasoline, for</p> <p>22 instance, does mean to say that we can't deduce</p>	<p style="text-align: right;">Page 10164</p> <p>1 or seller's perspective that has emerged from these</p> <p>2 proceedings.</p> <p>3 Q Is your view any different with respect to</p> <p>4 the Rosston model than it is with respect to the Bortz</p> <p>5 survey results?</p> <p>6 A I don't believe either one of them</p> <p>7 formally attempts to take account of what would happen</p> <p>8 to the supply side of the market.</p> <p>9 Q All right. Let's look at the specific</p> <p>10 suggestions you make. Do you see there at the bottom</p> <p>11 of page 9, you say, "Commercial broadcasters urged</p> <p>12 Congress to enact legislation that would permit</p> <p>13 regulation of the cable operators' charge"? Do you</p> <p>14 see that?</p> <p>15 A Yes.</p> <p>16 Q Bear with me for a moment here. Let's</p> <p>17 look at the context of the 1992 Cable Act. Certainly</p> <p>18 in 1992, cable operators were, in effect, a monopoly</p> <p>19 in the multi-channel video programming market,</p> <p>20 correct, by and large?</p> <p>21 A They had market power. I can't remember</p> <p>22 when DirecTV first launched. You would have to remind</p>

<p style="text-align: right;">Page 10165</p> <p>1 me. That would determine my --</p> <p>2 Q Mid to late '90s.</p> <p>3 A Okay.</p> <p>4 Q So the answer is yes?</p> <p>5 A So the answer is yes. They probably still</p> <p>6 have market power today, and they had market power at</p> <p>7 that time.</p> <p>8 Q And there were lots of consumer complaints</p> <p>9 about substantial success of increases in cable</p> <p>10 subscription prices, right? But it's the rates that</p> <p>11 cable operators charge their subscribers?</p> <p>12 A My recollection is there were and there</p> <p>13 were also lots of complaints for consumer groups. How</p> <p>14 many consumer complaints there were I don't know.</p> <p>15 Q Now, at that point most cable systems</p> <p>16 carried most local broadcast stations, notwithstanding</p> <p>17 that there were no must-carry rules in place. Is that</p> <p>18 right?</p> <p>19 A Nineteen ninety-two is 13 years after the</p> <p>20 appeal of all those signal carriage rules at the FCC.</p> <p>21 And there was a growth of -- substantial growth of UHF</p> <p>22 stations. As I recall, it started around 1980.</p>	<p style="text-align: right;">Page 10167</p> <p>1 stations and thereby reduce their advertising revenues</p> <p>2 accordingly, I would expect.</p> <p>3 Q Cable operators were also selling</p> <p>4 advertising time on cable networks, correct?</p> <p>5 A At that time?</p> <p>6 Q Yes.</p> <p>7 A Yes. I don't recall whether it was very</p> <p>8 important at that time. It has certainly grown over</p> <p>9 time.</p> <p>10 Q There were complaints from broadcasters</p> <p>11 and reported by the NAB about abuse by cable operators</p> <p>12 of their position, for example, in refusing to carry</p> <p>13 a station, local television station, on the same</p> <p>14 channel in which it was broadcast. Are you aware of</p> <p>15 that?</p> <p>16 A I'm aware of problems in that respect.</p> <p>17 And I wouldn't be surprised if there were complaints</p> <p>18 as a result of it.</p> <p>19 Q And from a cable operator's perspective,</p> <p>20 putting, say, channel 4 up on channel 67 and having</p> <p>21 the cable networks on which advertising could be sold</p> <p>22 down in the lower channels would be advantageous from</p>
<p style="text-align: right;">Page 10166</p> <p>1 Whether the cable systems carried most of them or not,</p> <p>2 I don't know. I'd have to look at the lineups.</p> <p>3 Q You don't know the exact facts on that?</p> <p>4 A Not at -- as I sit here, no.</p> <p>5 Q But it is the case that cable operators in</p> <p>6 a television market had incentives to carry the ABC,</p> <p>7 CBS, and NBC affiliates. Is that right?</p> <p>8 A Oh, certainly.</p> <p>9 Q They did so voluntarily?</p> <p>10 A I would think for the most part, they did</p> <p>11 it voluntarily, sir.</p> <p>12 Q Now, cable systems were also competitors</p> <p>13 of local broadcast stations, correct?</p> <p>14 A Oh, yes.</p> <p>15 Q In what ways?</p> <p>16 A Well, the cable systems offered viewing</p> <p>17 alternatives to the commercial broadcast stations'</p> <p>18 offerings.</p> <p>19 Q Which affected the advertising sales in</p> <p>20 the local market of the broadcast stations?</p> <p>21 A Certainly it would reduce the --</p> <p>22 presumably reduce the audiences of the commercial</p>	<p style="text-align: right;">Page 10168</p> <p>1 a business perspective, correct?</p> <p>2 A I believe that's correct. I'm not a</p> <p>3 student of channel placement on cable systems, but</p> <p>4 that is certainly the common lore in its published</p> <p>5 record.</p> <p>6 Q Is it fair to say, would you agree that</p> <p>7 the principal concern of the broadcast, commercial</p> <p>8 broadcast, industry in the 1992 legislative</p> <p>9 consideration was in assuring carriage of other</p> <p>10 stations on the local cable systems and actually on</p> <p>11 channel and actually without degradation of the signal</p> <p>12 and so on?</p> <p>13 A I'm not as I sit here an expert on the</p> <p>14 past lobbying activities of the National Association</p> <p>15 of Broadcasters. My recollection of that issue,</p> <p>16 though, was that one of their major concerns, a</p> <p>17 principal concern, was to be able to get that carriage</p> <p>18 at a zero price.</p> <p>19 Q A zero price to them?</p> <p>20 A Yes, under must-carry. Right.</p> <p>21 Q I want to just show you a document that</p> <p>22 has been introduced previously as an exhibit. I see</p>

<p style="text-align: right;">Page 10169</p> <p>1 Mr. Garrett has already pulled it out, NAB exhibit 2 17-X. Have you seen this document? 3 A I have no idea. I don't think so, but let 4 me see it. Mr. Garrett may not have shared it with 5 me. 6 Q It's testimony of Eddie Fritts, who is NAB 7 president, in April of 1989 before the Subcommittee of 8 Antitrust Monopolies and Business Rights of the Senate 9 Judiciary Committee. 10 And this was a consideration of 11 legislation that was a multi-year process that led to 12 the 1992 Cable Act. Are you aware of that? 13 A Yes. 14 Q Would you read this sentence on -- 15 JUDGE von KANN: Mr. Stewart, my 16 recollection is we covered some of this terrain pretty 17 well I think with prior witnesses. I am not 18 precluding you obviously, but I believe we had this 19 before, did we not, and -- 20 MR. STEWART: We did, but it's necessary 21 I think to set the context for cross-examination of 22 Dr. Crandall.</p>	<p style="text-align: right;">Page 10171</p> <p>1 highlighted sentence on the next page, please? 2 A "Finally, if reasonable must-carry and 3 channel positioning rules are adopted, the 4 broadcasting industry should have no direct interest 5 in whether cable's rates are reregulated." 6 Q Now, the reference to channel positioning 7 issues, that relates to the issue that you said you 8 were familiar with and about which you said you 9 wouldn't be surprised if there had been complaints. 10 Is that right? 11 A Yes. 12 Q Now, looking at your testimony here at the 13 top of page 10 and footnote 11, which cites JSC 14 exhibit 2, do you see that? 15 A Yes. 16 Q What is JSC exhibit 2? 17 A It's an exhibit in this proceeding. 18 Q What did it say? Why do you cite it? 19 A I can't remember what's on it, but it 20 refers to this lobbying before the Federal 21 Communications Commission, I believe. 22 Q This was the period immediately after the</p>
<p style="text-align: right;">Page 10170</p> <p>1 JUDGE von KANN: All right. 2 BY MR. STEWART: 3 Q Would you read the highlighted sentence on 4 page 309? 5 MR. GARRETT: Let me just take a look at 6 it, please. 7 THE WITNESS: "For the television" -- 8 MR. GARRETT: Wait. 9 THE WITNESS: I'm sorry. I'm sorry. 10 (Pause.) 11 JUDGE von KANN: Do you want him to read 12 it into the record or read it to himself? 13 MR. STEWART: Into the record, please. 14 JUDGE von KANN: All right. 15 THE WITNESS: "For the television 16 industry, must-carry and related channel positioning 17 regulations are a must. This is the single most 18 important step Congress can take to reinstitute fair 19 competition between cable and broadcast." 20 MR. STEWART: Okay. 21 BY MR. STEWART: 22 Q And would you flip the page and read the</p>	<p style="text-align: right;">Page 10172</p> <p>1 1992 Cable Act was passed, in which the FCC was 2 adopting its regulation rules, its must-carry rules, 3 and so on. Is that right? 4 A I believe -- well, they were certainly 5 adopting the rules necessary to carry out the '92 Act. 6 So those -- all of those were probably in play as well 7 as the rate regulation rules, with which I'm more 8 familiar. 9 Q And you say that the broadcasters urged 10 the FCC to reduce the monthly fee that monthly 11 subscribers are charged for cable service from 12 approximately \$16 or \$4.50. Do you see that? 13 A Yes. 14 Q Have you read those comments? 15 A Yes, I did some time ago, actually prior 16 to my original submission in this proceeding. So it 17 has been some time. 18 Q And you're aware that there is an attached 19 study. And what NAB was proposing was an approach to 20 rate regulation that based on the numbers, 21 preliminary, what they call preliminary numbers, would 22 have arrived at an average rate at something around</p>

1 \$4.50?

2 A I don't recall the details of how they got
3 there.

4 Q The FCC didn't adopt that approach, did
5 they?

6 A The FCC adopted a variety of approaches
7 and changed their mind. We would have to compare that
8 document you are talking about with what they finally
9 did. I don't know how close they came to that
10 approach.

11 Q Well, you wrote a book on what they did.
12 Is that right?

13 A Yes.

14 Q In essence, what they did was to freeze
15 the rates at a certain time around that period of time
16 and then mandate reductions, first a ten percent
17 reduction, then a seven percent reduction, in the
18 basic rate. Is that right?

19 A I don't remember the details, but they ran
20 several regressions, a term that we have used in this
21 proceeding a lot, and ran different regressions over
22 time. And so they changed their mind over time as to

1 Q We can establish this by looking at what
2 the statute was at the time. Let me just represent to
3 you, then, that for some significant number of cable
4 systems located in the television market within the
5 ADI or DMA of the television station, even though the
6 FCC's rule said cable operator has to carry that
7 station because it's local, it's within the market,
8 the Copyright Act definition still was based on the
9 1976 must-carry rules. So there were situations in
10 which you actually did distant signal, even though you
11 were in the local television market of the television
12 station.

13 A I guess that could be true. I really have
14 never examined this proposition.

15 Q Are you aware of the aspect of the FCC's
16 must-carry rules that required the television station
17 to reimburse the cable operator for copyright
18 royalties if there were a situation like that?

19 A No, I am not.

20 Q Again, that's in the FCC's rules to this
21 day. And we can establish it. I would like to ask
22 you to assume that that is the case.

1 how much those rates should have to be rolled back.

2 Q But \$16 to \$4.50 is like a 75 percent
3 reduction. Is that right?

4 A Something like that, yes.

5 Q And that wasn't what the FCC did, was it?

6 A No, I don't believe there is anything like
7 a 75 percent rollback.

8 Q Now, the other point that was made I think
9 when JSC exhibit 2 was presented in the direct phase,
10 was that the broadcast NAB in those pleadings said the
11 basic tier should include all broadcast stations other
12 than superstations. Are you aware of that?

13 A I am not aware of what NAB's lobbying was
14 on that.

15 Q Are you aware of the fact that at that
16 particular period in time, there was a difference
17 between the definition of local stations from the
18 FCC's perspective and the definition of local from the
19 Copyright Act perspective?

20 A I am aware that that has changed over
21 time, but I am not aware of what the difference was at
22 that time.

1 A Explain it to me one more time. What is
2 in the rules exactly?

3 Q For a station to -- during the period in
4 which the copyright law was still based on --
5 copyright law definition of local carriage was still
6 based on the old must-carry rules, a broadcast station
7 that wanted to be carried by a cable operator within
8 its local television market, the ADI, might be
9 required if it were actually a distant signal in that
10 local market to reimburse the cable operator for any
11 additional copyright royalties that the cable operator
12 would have to pay because, even though it was a local
13 signal for FCC purposes, it was still a distant signal
14 under the copyright rules.

15 A Okay.

16 Q And it would have had to have reimbursed
17 100 percent of the copyright royalties incurred by the
18 cable operator, even though they only received at that
19 point 5.75 percent of those royalties back for the
20 value of their own programs. I am going to ask you to
21 assume that that is the --

22 A What is the -- I am sorry. What is the

<p style="text-align: right;">Page 10177</p> <p>1 5.7 percent?</p> <p>2 Q That was the most recent CRT decision.</p> <p>3 A Oh, I see.</p> <p>4 Q And NAB hired us to go. We actually got</p> <p>5 more money for them the next time around. As of 1993,</p> <p>6 --</p> <p>7 A Right.</p> <p>8 Q -- that was the state of play.</p> <p>9 A Okay.</p> <p>10 Q Okay? Now, would it make sense to you</p> <p>11 that if the broadcast industry's principal focus was</p> <p>12 on getting carriage within the local television market</p> <p>13 in which its ratings were purported and it sold</p> <p>14 advertising and it were required to reimburse</p> <p>15 copyright royalties, would want to have all of the</p> <p>16 stations carried by the system on the basic tier and</p> <p>17 have a low price for the basic tier?</p> <p>18 A Well, what you are saying is that there is</p> <p>19 an offset here. To the extent that they get coverage,</p> <p>20 then -- and they get carriage, then the reduction in</p> <p>21 the basic rate that affects the copyright royalty is</p> <p>22 offset by the benefits of that carriage. I take it</p>	<p style="text-align: right;">Page 10179</p> <p>1 that the broadcasters are different. They're unique</p> <p>2 in this respect because they have an interest in</p> <p>3 getting carriage in order to get advertising revenues</p> <p>4 back.</p> <p>5 Q The suggestion that you have made here</p> <p>6 with regard to the JSC exhibit 2 only relates to a</p> <p>7 broadcaster's interest to get carriage within its</p> <p>8 local market where it sells its advertising, correct?</p> <p>9 A Well, I'm not sure that they would only be</p> <p>10 concerned about just that local market. If they're</p> <p>11 able to get further carriage outside of that market,</p> <p>12 then they can begin to garner advertising revenues</p> <p>13 outside of their local market. I would think that</p> <p>14 would be in their interest as well. And they probably</p> <p>15 have that in mind.</p> <p>16 Q If you accept as a proposition that I am</p> <p>17 going to represent in the evidence of this proceeding</p> <p>18 that there isn't additional advertising revenue to be</p> <p>19 gained by commercial broadcast stations outside their</p> <p>20 local market, putting WGN to one side, then the</p> <p>21 suggestion you just made is not applicable, correct?</p> <p>22 MR. GARRETT: I will object to the</p>
<p style="text-align: right;">Page 10178</p> <p>1 that is what you are leading me to.</p> <p>2 Q That concern with the offsetting benefit</p> <p>3 would be carriage in the local market of the</p> <p>4 television station, correct?</p> <p>5 A Yes.</p> <p>6 Q So this particular fact, given the context</p> <p>7 of what was happening in January of 1993, what the</p> <p>8 state of play was, does not provide evidence of a</p> <p>9 willingness by a commercial broadcast station to</p> <p>10 accept less than the value of their programs in a</p> <p>11 different market? That is, when they went out to be</p> <p>12 carried as a distant signal, this doesn't provide any</p> <p>13 evidence that suggests that they would be willing to</p> <p>14 accept less for their programs, does it?</p> <p>15 A Your one example may not, but in general,</p> <p>16 what this refers to is the fact that the broadcasters</p> <p>17 are willing to take lower 5.7 or whatever it is</p> <p>18 percent shares of copyright royalty revenues because</p> <p>19 they get carriage and they are able to increase their</p> <p>20 total advertising revenues. That's the deduction that</p> <p>21 comes from this.</p> <p>22 And what I am saying in this testimony is</p>	<p style="text-align: right;">Page 10180</p> <p>1 characterization on the record. I don't agree with</p> <p>2 that at all as to whether --</p> <p>3 JUDGE von KANN: Let's take it as a hypo,</p> <p>4 then. Then we'll figure out later what the record</p> <p>5 shows.</p> <p>6 THE WITNESS: Well, there is another</p> <p>7 issue. And that is, of course, even if it's just the</p> <p>8 carriage of the local signals, the fact of getting</p> <p>9 carriage on cable improves the signal quality for many</p> <p>10 stations.</p> <p>11 And they may have desire, but the</p> <p>12 broadcasters may be willing to sacrifice some</p> <p>13 copyright royalties in order to get better signal</p> <p>14 quality on the cable system.</p> <p>15 BY MR. STEWART:</p> <p>16 Q Better signal quality</p> <p>17 A Uh-huh.</p> <p>18 Q What do you mean by that?</p> <p>19 A Well, the -- having cable carry your</p> <p>20 signal improves the quality, particularly for -- and</p> <p>21 has over time. I don't know if it's still true, but</p> <p>22 certainly back in that period of time, I would think</p>

1 it would be true, say UHF stations, low-powered UHF
2 stations, for instance.

3 Q Locally?

4 A Yes.

5 Q In the local market?

6 A Yes. I mean, the cable -- sure, sure.

7 Q Yes. I don't want to look only at the
8 distant signal --

9 A Right.

10 Q -- carriage situation. So that is not
11 applicable in that situation, is it?

12 A Well, but the fact that the broadcasters
13 are in this case lobbying for lower cable rates must
14 suggest either that they think they can get some
15 benefit from lower rates and, therefore, greater cable
16 subscriptions for the basic tier or that they're just
17 simply trying to penalize the cable systems by
18 reducing their revenue flows because it certainly does
19 reduce the copyright royalty revenues.

20 Q Now, is it the case in your view that rate
21 regulation itself reduced the copyright royalty fund?

22 A I haven't reached a -- I haven't actually

1 equipment rentals."

2 A I remember that.

3 Q You do remember that?

4 A Yes.

5 Q So that suggests that there could be a
6 business strategy for a cable operator that would
7 include a relatively low-priced basic tier which would
8 expand subscribership for the purpose of increasing
9 overall revenues. Is that right?

10 A The passage in this book that you referred
11 to is an attempt by myself and Harold Furchtgott-Roth,
12 who subsequently became an FCC commissioner, to
13 explain why it is that we found that the price
14 elasticity of demand for basic cable was less than
15 unity in absolute value, meaning that were they to
16 raise price, they would get greater revenues.

17 No firm of market power operates
18 presumably in a range of inelastic demand. And our
19 deduction was that the reason they may do this is to
20 get their service into more homes so as to be able to
21 sell them enhanced tiers, pay-per-view, premium
22 services, and so forth.

1 done an empirical analysis of it. It strikes me that
2 it would be hard to conclude that a reduction of this
3 magnitude wouldn't do so. It would be offset by
4 sufficient increase in cable subscription to offset
5 the reduction, the effective reduction, in price.

6 Q And I think that there has been testimony
7 about the reduction in the royalty fund resulting from
8 rate regulation for the first couple of years, '93 and
9 '94, when rate regulation first went into effect. Are
10 you aware of that testimony?

11 A I am not aware of that testimony.

12 Q In your book, you talk about -- are you
13 familiar with the phenomenon of tiering?

14 A Do you mean on cable systems?

15 Q Yes.

16 A Yes. Well, I'm broadly familiar, yes.

17 Q Now, in your book at page 67, you say, "A
18 cable company might sell additional subscriptions" --
19 and I am going to show you this so you can read the
20 context -- "might sell additional subscriptions to a
21 basic service at a loss to attract additional
22 subscribers to premium and pay-per-view services and

1 Q And you're aware, are you not, that the
2 rate regulation adopted by the FCC, particularly as it
3 related to the basic tier, was different from the rate
4 regulation of higher tiers that cable operators
5 offered?

6 A Yes, I do.

7 Q Are you aware of the fact that the basic
8 tier was required to include all broadcast stations
9 except for superstations?

10 A I don't recall as we sit here that that
11 was the requirement, but if you --

12 Q I can show you, but let's just proceed on
13 that premise. I would like to hand you copies of two
14 of the exhibits that were presented by Dr. Ducey in
15 this proceeding in his direct case, which are his
16 exhibits 1 and 3.

17 Q Dr. Crandall, have you seen these exhibits
18 before?

19 A No, I have not.

20 Q Well, the exhibit 1 just charts the path
21 of the royalty funds, the cable copyright royalty
22 funds, over the years. And the second chart, exhibit

number 3, charts the instances of carriage; that is, the number of cable systems that carried various categories of stations over time. The one thing I want to point out to you is that the intervening years, '93 to '98, are compressed a bit so that the slopes are different on the lines. Do you see that?

A Yes.

Q Now, you can see in exhibit 1 that between '93 and '94, the middle of '94, when the statute was passed, the rate regulation was adopted, the rate rollbacks occurred, that there was a decline in the overall compulsory license royalties. Do you see that?

A Yes.

Q But then it starts to move upward. Do you see that?

A Yes.

Q Now, if you look over exhibit 3, you see that, first of all, in the period 1990 to 1993, the carriage of superstations in terms of carriage incidence far outstrips those of the other program types there. Do you see that?

A -- rises between '94 and -- I don't know -- '96 and a half, '94 and a half and '96 and a half, I guess. Now, over on the other exhibit, we are talking about total cable compulsory license royalties, which are based upon the basis cable rates.

Q They're based on the rates of all tiers that have any television in them, both basic and if you have a superstation in an expanded basic tier, that --

A Oh, I see. Okay.

Q Okay?

A Now, what I don't know is how many of these superstations are put in the upper tiers, which weren't unregulated. I mean, they were just regulated differently.

Q Right.

A And how many are on the basic tier?

Q Right. We don't know that.

A Right.

Q In particular, the difference in the trend of carriage of superstations in those intervening years, mid '94 to mid '97, compared with carriage

A Yes.

Q And in the middle of '94, after a bit of a decline from '93, you see an upward trend in the carriage of superstations. Do you see that?

A Yes.

Q Now, if it were the case that the tiers that included superstations were subject to less stripped rate regulation and the cable operators were pursuing their profit-maximizing scheme of raising prices to the extent possible on upper tiers and including superstations in those tiers to extract subscribers, this picture would show that the cable operators, cable industry had figured out a way to get back on an increasing trend for their gross receipts by adding superstations to their higher tiers above the basic tier, right? Would that be consistent with --

A How do you reach that deduction? The number of superstations and instances of carriage, as you called it, because this is not weighted by size of cable system but --

Q Right.

instances of the other types, would be consistent with a phenomenon in which cable operators are now adding superstations and maximizing the price of their expanded basic tiers, which has the effect of also increasing the cable compulsory license royalty fund?

A It's possible, but it would be nice if we had some numbers on what was going on with average rates. And also one of the things that the panel should be aware of is that in this period in the -- I don't know exactly when it began.

In the mid to late 1990s, rate regulation fell apart. I mean, essentially the FCC threw up its hands, allowed MSOs to just claim they were complying when they weren't really complying. In effect, rate regulation became a nightmare and really was not much of an effect.

Q What period was that?

A I don't know when that starts. It starts after -- just as we were publishing this book and shortly thereafter. I would guess '96, somewhere in there, '95-'96. It didn't work very well.

Q You would expect if that were the

<p style="text-align: right;">Page 10189</p> <p>1 principal driving factor to see if, then, a continuing 2 increase in the compulsory license royalty fund 3 through '96 and beyond, would you not? 4 A What you see on both of your charts is a 5 substantial drop-off in superstation carriage. And, 6 of course, we had a lot of discussion in this room I'm 7 sure about one major reason for that. And that is 8 WTBS. 9 But also there are lots of things going on 10 in the programming market. The number of basic cable 11 networks is expanding like topsy over this period. 12 And the alternatives available to cable systems are 13 expanding substantially. 14 Q Now, going back to the FCC proceedings to 15 implement the Cable Act, other groups represented in 16 this room also participated in those proceedings, did 17 they not? 18 A I'm sure they did, yes. 19 Q Are you familiar with positions taken by 20 the sports claimants in those proceedings? 21 A Not specifically, no. 22 Q I want to show you --</p>	<p style="text-align: right;">Page 10191</p> <p>1 Q WGN also has a dip in that period. Is 2 that right? 3 A Yes. I don't know what was happening to 4 the baseball teams at that time. I wouldn't put a 5 substantial weight on that, yes. 6 Q Good for you, Dr. Crandall. 7 A Maybe you're not as much of a sports fan 8 as I. 9 Q I would like to hand you what I have 10 marked as NAB exhibit 55-RX, a document that we got 11 from the FCC's records in this same docket that JSC 12 exhibit 2 comes from. As you can see, this was filed 13 by the Office of the Commissioner of Baseball on May 14 16th, 1994. Do you see that? 15 A I do. 16 (Whereupon, the aforementioned 17 document was marked for 18 identification as NAB Exhibit 19 Number 55-RX.) 20 BY MR. STEWART: 21 Q There is a bit of a discussion of this on 22 page 2, but to set this in context, the FCC had</p>
<p style="text-align: right;">Page 10190</p> <p>1 JUDGE von KANN: Dr. Crandall, while we 2 are getting at that, recognizing this isn't your 3 chart, do you have any particular explanation on the 4 NAB exhibit 3 for this pretty dramatic drop-off in the 5 superstations incidence prior to 1998, which I'm told 6 is when WTBS ceased being a superstation, that that 7 wasn't the case in '96 or '7? So something else is 8 going on there besides that. 9 THE WITNESS: My hypothesis would be that 10 the development of more and more basic cable networks 11 available by satellite was becoming an increasing 12 source of competition for the superstations, but I 13 haven't looked at that carefully. 14 JUDGE von KANN: Okay. 15 BY MR. STEWART: 16 Q I just want to just hand you a copy of NAB 17 exhibit 4, which breaks down the superstation carriage 18 into individual stations. Do you see that in this 19 '96-'97 period, WWOR drops from its level of, say, 500 20 Form 3 systems to close to zero? 21 A I don't know about zero but maybe 50 or 22 something or 100, yeah.</p>	<p style="text-align: right;">Page 10192</p> <p>1 proposed as part of its rate adjustment provisions one 2 in which it said that, just roughly speaking, if you 3 add a channel to your cable services, you can increase 4 your rate to recover programming expenses associated 5 with an added channel of some 7.5 percent market. Are 6 you familiar with that aspect of this? 7 A I remember that, not the details. But I 8 remember that aspect of their rules. 9 Q Here on the first page, where baseball is 10 asking for -- it's actually not clear exactly what. 11 It looks like they're putting down their marker, 12 saying, "We want to make sure that we're involved in 13 whatever reconsideration of this happens." 14 MR. GARRETT: Is there a question there? 15 BY MR. STEWART: 16 Q If you look at the bottom of the first 17 page, you see where the statement is made, "Baseball 18 has a strong interest in ensuring that its programming 19 reaches the largest number of viewers possible"? 20 A Yes. 21 Q Now, is that strong interest one that you 22 would take into account in determining whether</p>

<p style="text-align: right;">Page 10193</p> <p>1 baseball would accept less than the full value of its 2 programming in order to achieve that strong interest? 3 A I don't believe that baseball would be 4 able to obtain advertising revenues directly, but 5 nowhere in here do I see an assertion. Maybe there 6 was an assertion made somewhere else that the Major 7 League Baseball wanted lower basic cable rates. 8 Q I don't think that is what this is about. 9 A It sounds to me as if maybe they want 10 actually greater incentive to add channels for the 11 cable systems and maybe higher rates, but I'm not sure 12 what they're asking for. 13 Q Do you see there at the top of page 2 they 14 talk about their concern that cable operators would be 15 unwilling to add the baseball cable casts to the basic 16 tier of service? 17 A Yes. 18 Q Instead, the cable operators might offer 19 baseball cable casts as an a la carte offering; that 20 is, just to the people who want to pay extra for it? 21 Is that right? 22 A Yes.</p>	<p style="text-align: right;">Page 10195</p> <p>1 sports networks as part of a basic tier of service, 2 rather than charging just the cable subscribers who 3 want to receive the sports programming? 4 MR. GARRETT: I am sorry. Did that 5 question ask about the sports interests or about the 6 regional sports networks? 7 MR. STEWART: Sports interests. 8 THE WITNESS: Will you ask the question 9 one more time. I'm sorry. 10 BY MR. STEWART: 11 Q Do you know whether there is an issue that 12 continues today about whether regional cable sports 13 networks should be carried by cable operators as a 14 part of their basic service available to all 15 subscribers or only on an a la carte basis? 16 A I don't know of that issue today. 17 Q Do you know anything about the Yes Network 18 in -- 19 A I've read some things about it, but, 20 unfortunately, I'm - that's only something I pass by 21 in the Wall Street Journal occasionally. 22 Q Let me get back to this. It strikes me</p>
<p style="text-align: right;">Page 10194</p> <p>1 Q Are you familiar with that phenomenon in 2 general? 3 A I remember back when I was -- now we are 4 talking about ten years ago -- that there was a 5 possibility under the rules of a la carte offerings. 6 It strikes me that what has happened since that time 7 is that they have gone to tiers with much less 8 reliance on a la carte, but I think a la carte was 9 something that developed principally because of 10 regulation. 11 Q Do you know whether baseball interests 12 have continued to work to make sure that these -- let 13 me drop back. Do you know whether these discussions 14 here of baseball telecasts, cablecasts, are a 15 reference to regional sports networks on which 16 baseball games are cablecast? 17 A They could be. I don't remember at this 18 time, which is nine years ago, how pervasive regional 19 sports networks were. 20 Q Are you familiar with the phenomenon that 21 baseball interests have continued to attempt to make 22 sure that cable operators carried their regional</p>	<p style="text-align: right;">Page 10196</p> <p>1 that perhaps what baseball is saying here at this time 2 is that if you regulate the basic tier at very low 3 rates, then you induce the cable operators to move 4 away from putting things on basic service, like 5 baseball, and putting it on other tiers. 6 And at that time, it may be that the 7 demand for those a la carte, whether they were 8 regional networks or whatever they were, was a lot 9 lower than it is today. At some point, as income 10 grows, as the taste for sports increases and becomes 11 more pervasive, it may well be that that trade-off 12 changes. 13 So this is 1994. You just asked me a 14 question about 2003. The royalties changed since 15 then, I would think. 16 Q What economic interest would baseball have 17 in preferring carriage on a basic cable service, as 18 opposed to on an a la carte service? 19 A I would think they would want as broad 20 carriage as they can get. And to the extent that -- 21 and I guess they would have to make a judgment whether 22 they can make -- whether they can get more money from</p>

<p style="text-align: right;">Page 10197</p> <p>1 a regional sports network than they can from the 2 enhanced revenues from an a la carte -- excuse me -- 3 an expansion of the basic service through 4 advertising-supported broadcasting and -- 5 Q Are you familiar with or do you know why 6 there would be a concern about the adequacy of a rate 7 adjustment rule that allows you to increase your 8 subscriber rates by the full amount of programming 9 expenses plus seven and a half percent, why baseball 10 would have thought that would be inadequate to induce 11 cable operators to put the channel on their basic 12 service? 13 A Let me read this just briefly. (Perusing 14 document.) I don't recall exactly how this worked 15 out, but I do remember that there was considerable 16 concern that these regulations would slow the growth 17 of basic cable networks. And I believe even Dr. 18 Hazlett documented that in one of his books. 19 MR. STEWART: I would move exhibit 55-RX 20 for impeachment purposes. 21 JUDGE von KANN: Any objection? 22 MR. GARRETT: No objection.</p>	<p style="text-align: right;">Page 10199</p> <p>1 starting at page 3, where the comments begin. You can 2 see there and over onto the top of page 4 comments 3 that have to do with this copyright royalty 4 indemnification issue that we discussed earlier. 5 A Uh-huh. 6 Q Under paragraph 2 at the bottom of page 4, 7 there is a discussion about requests to add 8 communities to or delete communities from a television 9 market. Do you see that? 10 A On page -- 11 Q On page 4. It runs over to pages 5 and 6. 12 Are you familiar with what that issue was in the 13 implementation of the 1992 Act? 14 A I don't recall now, no. 15 Q I am going to just represent to you that 16 there was a provision. First of all, the must-carry 17 rights and the retransmission consent rights in the 18 local market were tied to the television market 19 through ADI. Okay? 20 A Yes. 21 Q That was the default. There was a 22 provision for special circumstances in which a station</p>
<p style="text-align: right;">Page 10198</p> <p>1 JUDGE von KANN: All right. So received. 2 (Whereupon, the aforementioned 3 document, having previously 4 been marked for identification 5 as NAB Exhibit Number 55-RX, 6 was received in evidence.) 7 MR. STEWART: I would next like to hand 8 you a document I would like to have marked as exhibit 9 56-RX. 10 (Whereupon, the aforementioned 11 document was marked for 12 identification as NAB Exhibit 13 Number 56-RX.) 14 BY MR. STEWART: 15 Q Dr. Crandall, this is a copy again from 16 the FCC's files of comments filed by our dear friend 17 Phil Hochberg on behalf of the National Basketball 18 Association and National Hockey League in FCC 19 proceeding docket number 92-259, which was another 20 part of the implementation of the 1992 Cable Act. 21 A I see that, yes. 22 Q Okay. I would like you to turn to</p>	<p style="text-align: right;">Page 10200</p> <p>1 or cable operator could petition the FCC and say, "No. 2 For must-carry purposes, this community ought to be 3 considered part of that market or that market." Okay? 4 Does that sound familiar to you? 5 A I don't recall any of those provisions. 6 I think we never got into it in our study of cable 7 regulations. 8 Q In this comment, Mr. Hochberg or the NHL 9 and the NBA are addressing the question who should 10 have the right to petition the FCC to change the 11 definition of the local market under the rules 12 implementing the '92 Cable Act. Okay? And at the 13 bottom of page 5, there is a paragraph that begins 14 "Finally." Do you see that? 15 A Yes. 16 Q Would you read that to yourself and then 17 just let me know what you understand that to be 18 saying? 19 A (Perusing document.) I've read it. 20 Q What do you understand it to be saying? 21 A What I understand them to be saying is 22 that the ADI dimensions of a market don't necessarily</p>

<p style="text-align: right;">Page 10201</p> <p>1 correspond to the markets that sports franchises 2 perceive geographically and, therefore, that these two 3 leagues would like the right at least to request under 4 this process that these communities be added or 5 deleted; i.e., that the definition of what constitutes 6 a local market for these purposes be changed by 7 regulation to better confirm to the geographical 8 dimensions of sports markets. 9 Q In the particular example he uses about 10 New Jersey, do you see that? 11 A Yes. 12 Q What are you saying? Is this a fair 13 characterization? The NBA and the NHL wanted to have 14 the ability to ask the FCC, in effect, to extend the 15 must-carry rights of Philadelphia stations so that 16 they could be carried by cable operators in New 17 Jersey. Is that right? 18 A Well, at least -- yes. Somehow I judge 19 that would be one of the possibilities because the 20 conclusion is so they can target New Jersey 21 communities, so that a Philadelphia franchise can 22 target New Jersey communities. So I judge that's what</p>	<p style="text-align: right;">Page 10203</p> <p>1 A Yeah. 2 Q And do you know whether the FCC adopted 3 that position? 4 A No, I do not. 5 MR. STEWART: I would move 56-RX for 6 impeachment purposes. 7 MR. GARRETT: No objection. 8 JUDGE von KANN: So received. 9 (Whereupon, the aforementioned 10 document, having previously 11 been marked for identification 12 as NAB Exhibit Number 56-RX, 13 was received in evidence.) 14 MR. STEWART: And, Your Honor, with that, 15 I have no further questions for Dr. Crandall. 16 JUDGE von KANN: Okay. Thank you. 17 Okay. I think Mr. Hester indicated he 18 would have some questions. 19 MR. HESTER: Yes, sir. Good afternoon, 20 Dr. Crandall. 21 THE WITNESS: It is afternoon. Good 22 afternoon.</p>
<p style="text-align: right;">Page 10202</p> <p>1 they have in mind. 2 Q So, even though the Philadelphia stations 3 could be carried by those New Jersey cable systems as 4 distant signals, the NBA and the NHL were asking for 5 the right to acquire those cable systems to carry the 6 Philadelphia stations under the must-carry rules. Is 7 that fair? 8 A That may be -- that's a reasonable 9 deduction. I don't know if that conforms to the facts 10 at the time for just this paragraph. 11 Q At the very end of this set of comments, 12 starting on page 13, the NBA and the NHL argue that 13 the retransmission consent rules ought to allow them, 14 the leagues, to negotiate to control the stations' 15 exercise of retransmission consent rights with respect 16 to cable carriage. Do you see that? 17 A You say to control. They say to maintain 18 some control. 19 Q Okay. Right. To negotiate with 20 broadcasters to affect or influence the exercise by 21 the broadcasters of their retransmission consent 22 rights?</p>	<p style="text-align: right;">Page 10204</p> <p>1 MR. HESTER: Yes. We have made it. I am 2 Tim Hester, representing the Public Television 3 Claimants. 4 THE WITNESS: I remember. How do you do? 5 CROSS-EXAMINATION 6 BY MR. HESTER: 7 Q I wanted to ask you to turn to page 1 of 8 your testimony, please. 9 A Okay. 10 Q And I wanted to ask you, in particular, to 11 focus on the discussion in paragraph 5, if you could. 12 Here in the first sentence, you refer to the mix of 13 programming purchased in the unregulated market. And 14 you compare that or distinguish that against the mix 15 purchased in the regulated market. Do you see that? 16 A Yes. 17 Q In your view, are you making the point 18 here that the mix of programming purchased in the 19 unregulated market; in other words, the hypothetical 20 market, would not necessarily be the same mix of 21 programming as is purchased in the actual market? 22 A That's the point. The -- after these</p>

1 negotiations take place, it may lead to -- assuming,
 2 by the way, that we are still talking about only
 3 imported distant signals and that's the mechanism by
 4 getting -- for getting the programming to the cable
 5 supplier, it could well be that the prices, all of the
 6 prices, that emerge from this lead to a shift in the
 7 program mix on that imported distant signal.

8 Q And so the point you are making here is
 9 that in the second sentence now, you say that it would
 10 be difficult to know exactly what that hypothetical
 11 program mix might be?

12 A Of course, yes.

13 Q Because it's complicated to estimate what
 14 all of the outcomes would be of that unregulated
 15 marketplace?

16 A Yes. I would need to know what the prices
 17 would look like and how the cable -- excuse me -- how
 18 the broadcasters carrying those signals would respond
 19 to that marketplace. It would be very difficult to do
 20 without -- you would need some sort of experiment or
 21 some empirical evidence where it has been tried as an
 22 analog.

1 Q And then in the next sentence, the third
 2 sentence, in paragraph 5, you say, "So, instead, the
 3 panel should look at the value of the programming
 4 purchased"?

5 A Yes.

6 Q But the point you're making there is that
 7 the value of the programming actually purchased is
 8 meant to be a proxy or a means to getting toward a
 9 different mix of programming that might be purchased
 10 in the hypothetical market?

11 A I think what I am saying is that I doubt
 12 that the panel could make any judgments about how the
 13 mix would change and, therefore, that this is largely
 14 an exercise overcompensating those people who are
 15 supplying the current programs and their current
 16 program mix.

17 Q But the point you're making, I take it, at
 18 the start of this paragraph 5 is that in the
 19 unregulated market, which is, I take it, the
 20 marketplace that you think the panel should be trying
 21 to replicate, is that right?

22 A That's my understanding of the history of

1 this exercise. I mean, as an economist, it strikes me
 2 if you're looking for value and to allocate in terms
 3 of value, you need to know how the participants would
 4 behave in an unregulated marketplace.

5 Q So you begin with the premise that the
 6 panel's goal in undertaking to estimate fair market
 7 value is to think of a hypothetical unregulated
 8 market?

9 A Yes.

10 Q And then the point you make at the bottom
 11 of this first page is that the Bortz survey in your
 12 view strikes a balance between the actual choices in
 13 the regulated market. That's what the Bortz survey is
 14 looking at?

15 A The Bortz survey is looking at how cable
 16 systems value the programming they now carry. And,
 17 therefore, this does provide an exercise of asking how
 18 that mix of programming would change if we had an
 19 unregulated marketplace.

20 Q So you're looking at what was actually
 21 carried as a proxy of trying to come up with the
 22 values in a market where the mix of programming might

1 be different?

2 A Well, as a proxy -- well, I'm not sure
 3 that that is quite correct. It strikes me that the
 4 exercise this panel is engaged in is how a marketplace
 5 would price -- would value these various programs that
 6 are actually distributed.

7 I mean, take the -- we know that when we
 8 deregulate markets, markets change rather
 9 dramatically. I mean, assume that one of these
 10 categories of programming would completely disappear
 11 and three or four new ones would appear.

12 The panel, it seems to me, would be in a
 13 very difficult position to try to make such judgments
 14 and provide an allocation of copyright royalties to
 15 programming that today isn't even produced, doesn't
 16 even exist.

17 And it seems a more -- that the more
 18 modest understanding of their role is to determine how
 19 to divide the copyright royalty pool based upon the
 20 value of that programming to cable operators, given
 21 its current mix.

22 Q But I take it in paragraph 5, one of the

<p style="text-align: right;">Page 10209</p> <p>1 points you're making is that you couldn't simply look 2 entirely at the actual programming choices actually 3 made to know what would happen in the hypothetical 4 free market? 5 A If the goal of this panel was to determine 6 what would happen in a totally unregulated market; 7 that is, one without compulsory copyright licenses, 8 then it is certainly possible, as I say, that the mix 9 of programming would change. 10 Q Okay. Mix of programming would change 11 from what was actually purchased in these years? 12 A Yes, it could change, but what I said 13 previously was that it seems to me that this is an 14 exercise that is not worth doing that cannot be easily 15 done and that the exercise, as I understand it, is 16 more to figure out what the programs that are actually 17 distributed are worth to the participants and to the 18 cable operators. 19 Q But if you merely looked at what was 20 actually distributed without trying to take account of 21 the hypothetical market, you're actually not 22 estimating the fair market values, are you?</p>	<p style="text-align: right;">Page 10211</p> <p>1 A No. I think the actual choices remain 2 constant, but the amount paid for it -- the question 3 is, how much does a cable operator -- how much value 4 does he place on what he actually carries? 5 As I understand the Bortz survey, it is to 6 ask him -- remind him what he now carries on imported 7 distant signals and to ask him what the value of that 8 would be. How much of his budget would he allocate 9 for that programming? 10 Q And you include, again, as we have 11 discussed, in your contemplation of this hypothetical 12 market the prospect of a change in programming mix as 13 part of what the market could produce? 14 A I think that's less likely. I think it's 15 more likely what happens is there is a change in 16 relative prices, but not so much a change in the mix. 17 I think the entire approach of the Bortz survey is to 18 focus on what this cable operator now takes and how 19 much of his budget he would allocate for various 20 components of it. 21 Q Well, I am referring back, I guess, to the 22 first line of paragraph 5, where you talk about the</p>
<p style="text-align: right;">Page 10210</p> <p>1 A Well, the fair market value of what was 2 distributed. I mean, I assume that what is going on 3 here is that we're compensating the copyright owners 4 for the programs that were actually exhibited, not 5 compensating them for what might have been. 6 We might have live opera from La Scala 7 every night, but I am not sure that La Scala is 8 represented in this room and should be represented. 9 Q Well, we're trying. Let me ask you to 10 look at the top of page 2. When at the very first 11 line here, you refer to the hypothetical nature of a 12 free market, that's the one where a marketplace value 13 would be derived. Is that what you mean by that, 14 "hypothetical nature of a free market"? 15 A Yes. And then I put in parens "by asking 16 a cable operator how it would allocate its budget" 17 across program categories if such a choice were 18 possible. 19 Q Right. And you distinguish that 20 hypothetical nature of a free market from what you 21 refer to at the bottom of page 1, which is the actual 22 choice in a regulated market, right?</p>	<p style="text-align: right;">Page 10212</p> <p>1 mix of programming purchased being different. That's 2 where you refer to a change in the program mix as one 3 consequence of the unregulated market? 4 A As I say, it is possible that the mix 5 purchase would differ, but then later on, two 6 sentences later, I say, "Rather, the panel should 7 assess the value of the programming actually 8 purchased." 9 Q Because you are saying that's the one that 10 you can readily do? 11 A I believe, yes, as a practical matter, 12 it's easier to do. I am not going to comment upon a 13 legal matter of whether this panel could allocate 14 copyright royalties to programming not now carried. 15 Q Let me ask you to turn over to page 7, 16 paragraph 17. 17 A Yes. 18 Q The third or fourth sentence down, you 19 say, "The Bortz survey directly reproduces the 20 hypothetical market conditions supposed by the panel 21 by using experimental spending patterns." Do you see 22 that?</p>

1 A Yes.

2 Q When you say "the hypothetical market
3 conditions supposed by the panel," what are you
4 referring to there?

5 A Well, a market in which the cable operator
6 is free to decide how much you would be willing to
7 spend on the various categories of programming he
8 actually now takes.

9 Q So it's a market in which the compulsory
10 license doesn't exist?

11 A Well, presumably it's an alternative to
12 the compulsory license, but, as I said earlier, it's
13 probably the practical solution to it is undoubtedly
14 to focus on the programming actually carried and not
15 to vary the programmings.

16 Q But the hypothetical market you are
17 talking about is one where there is no compulsory
18 license?

19 A Yes.

20 Q When you refer to experimental spending
21 patterns, you are really talking there about -- well,
22 maybe I should ask you. What do you mean when you

1 mean when you say "experimental spending patterns"?

2 A Well, in a sense, it isn't asking the
3 cable operator to undertake a thought experiment
4 because at the present time, all he knows is he pays
5 such and such a share of his basic cable revenues for
6 a particular program or a particular set of programs
7 that he imports as distant signals.

8 He doesn't have to pay for the individual
9 components. The programming was in those signals
10 directly. Now, the Bortz survey asks him to go
11 through a thought experiment. How much would you be
12 willing -- how much do you value each of these
13 programming types that are in these imported distant
14 signals? So by that, I mean that it's an experimental
15 approach.

16 Q Okay. Let me ask you to turn to pages 8
17 and 9, maybe 9. I wanted to go back briefly to this
18 discussion you had with Mr. Stewart on the issue of
19 the treatment of the 3.75 signals in the Rosston study
20 and, in particular, this point you make about the
21 treatment of PBS.

22 I take it, first of all, that this point

1 you make about PBS applies just as readily to an
2 independent signal that is carried at one DSE, rather
3 than a 3.75 rate. The issue you're raising, this
4 simple example, could just as easily be applied to any
5 other signal. Right?

6 A It could be applied to any other
7 combination of signals. On -- the point you raise is
8 that if a cable operator carries precisely one DSE, he
9 has no incremental cost. The point that was raised in
10 the paragraph that rolls over from page 8 to 9,
11 paragraph 19 is that when you combine a 3.75 signal
12 with a PBS signal, you get a batch of minutes on the
13 commercial signal, on the PBS signal, but you get a
14 total royalty responsibility, which has attributed to
15 the whole package. And, of course, part of the
16 problem is trying to separate out those two.

17 Q Right. And the same point would apply
18 about the total package of royalties paid in being
19 applied to a batch of minutes. The same point would
20 apply if you had an independent signal combined with
21 a 3.75 signal. You would have the same issue?

22 A Yes.

1 Q Okay. And you recognize that there was a
2 dummy variable included in the Rosston analysis to
3 take account of this?

4 A Yes, it was, but, as I answered --

5 Q Now --

6 MR. GARRETT: Let him finish his answer.

7 MR. HESTER: Well, I think that was a
8 "Yes" or "No."

9 MR. GARRETT: I don't think it was a "Yes"
10 or "No." I think he is entitled to explain his
11 answer.

12 THE WITNESS: I don't believe that the
13 specification would capture that accurately enough.
14 As I mentioned earlier, I think the entire
15 specification is putting royalty revenues on the
16 left-hand side and aggregates of minutes on the
17 right-hand side. It's not an appropriate way to do
18 this. But just putting a dummy variable suggests that
19 the effect of the 3.75 is independent of the size of
20 the system.

21 MR. HESTER: I was just getting a ruling
22 on this. We will go through it.

<p style="text-align: right;">Page 10217</p> <p>1 MR. GARRETT: Okay. Sure.</p> <p>2 BY MR. HESTER:</p> <p>3 Q I wanted to ask you, how does a dummy</p> <p>4 variable work?</p> <p>5 A A dummy variable picks up the effect of</p> <p>6 whether something is in place or not.</p> <p>7 Q Right.</p> <p>8 A In this case, 3.75 is in place, but the</p> <p>9 issue is, how does that interact with the rest of the</p> <p>10 variables in the system?</p> <p>11 Q Well, let me abstract away from the</p> <p>12 particular Rosston study. I wanted to ask you a</p> <p>13 broader question about regression analysis and</p> <p>14 technique. First of all, dummy variables are used all</p> <p>15 the time in regression analyses, right?</p> <p>16 A Yes.</p> <p>17 Q And the way they are done as a matter of</p> <p>18 methodology is if you have a particular proposition or</p> <p>19 issue you are concerned about, you give the dummy</p> <p>20 variable a value of either one or zero, right?</p> <p>21 A That is usually the definition of a dummy</p> <p>22 variable.</p>	<p style="text-align: right;">Page 10219</p> <p>1 trying to control for in the dummy variable, right?</p> <p>2 A That is correct.</p> <p>3 Q And so in this circumstance, Mr. Rosston</p> <p>4 included a dummy variable that was intended to pull</p> <p>5 out. I recognize you have a point. You are not</p> <p>6 comfortable with whether it worked. But the intent</p> <p>7 was to pull out the impact of the 3.75 Fund by</p> <p>8 whenever you had a 3.75 Fund for a particular system,</p> <p>9 it got a one and if a 3.75 Fund wasn't part of the</p> <p>10 mix, it got a zero. Right?</p> <p>11 A That's what he intended to do.</p> <p>12 Q Right. And do you know, in fact, that the</p> <p>13 coefficient for that 3.75 Fund dummy variable ended up</p> <p>14 to be a quite large number?</p> <p>15 A Yes. It was inevitable given the rate</p> <p>16 structure. 3.75 is a large multiple of the rest of</p> <p>17 the rates in the system.</p> <p>18 Q Right. And it was also highly</p> <p>19 statistically significant, right?</p> <p>20 A Yes, it was.</p> <p>21 Q This is not anything unusual in regression</p> <p>22 analyses. There are many occasions when you would see</p>
<p style="text-align: right;">Page 10218</p> <p>1 Q Right.</p> <p>2 A It takes on two values: one or zero.</p> <p>3 Q It's a one or a zero. And so if you have</p> <p>4 a certain event or observation or whatever it is you</p> <p>5 are trying to control for, you give the dummy variable</p> <p>6 a one in that circumstance. And otherwise you give it</p> <p>7 a zero. Right?</p> <p>8 A Yes.</p> <p>9 Q So if you are trying to estimate IQ as a</p> <p>10 function of income and you are trying to control for</p> <p>11 some other factor that you think might have some</p> <p>12 spurious effect, you might throw a dummy variable into</p> <p>13 that equation. And you would give it a one or a zero,</p> <p>14 right?</p> <p>15 A I think a dummy variable for IQ is an</p> <p>16 interesting concept, but yes, I understand what you</p> <p>17 are saying.</p> <p>18 Q I'd better work on my examples. But then</p> <p>19 you look at the size of the coefficient estimated for</p> <p>20 the dummy variable and the statistical significance of</p> <p>21 the coefficient in assessing whether you have been</p> <p>22 able to pull out the impact of whatever it is you are</p>	<p style="text-align: right;">Page 10220</p> <p>1 some particular point in your data set that you think</p> <p>2 might skew the results. And so you throw in a dummy</p> <p>3 variable to take account of that to avoid the skewing</p> <p>4 effect.</p> <p>5 A Well, I am glad you used the term "throw</p> <p>6 in" because in a sense, that is what happened here.</p> <p>7 I think that thrown in without thinking about how the</p> <p>8 3.75 rate affects royalties.</p> <p>9 And it should be multiplicative with, for</p> <p>10 instance, the size of the cable system. I mean, to</p> <p>11 have it sit out here by itself says that a cable</p> <p>12 system with 1,000 subscribers, it has the same effect</p> <p>13 in terms of total royalty revenues as a cable system</p> <p>14 out here with a million subscribers.</p> <p>15 And I think that is just a very</p> <p>16 problematic -- I mean, a significant specification</p> <p>17 error in the entire equation.</p> <p>18 Q Well, a cable system with 1,000</p> <p>19 subscribers presumably isn't going to have a 3.75</p> <p>20 signal, right?</p> <p>21 A Well, but you take my point. That is, I</p> <p>22 would be willing to bet if we look at those systems</p>

<p style="text-align: right;">Page 10221</p> <p>1 that are taking 3.75 signals, they're not all of the</p> <p>2 same size and the impact is multiplicative, not</p> <p>3 additive.</p> <p>4 Q But the point I am trying to work through</p> <p>5 with you is that in terms of whether there is some</p> <p>6 particular skewing as to public television from this,</p> <p>7 the dummy variable is intended in the specification to</p> <p>8 pull that out?</p> <p>9 A I believe -- and I know Dr. Rosston well,</p> <p>10 and he's a good economist. I believe that was his</p> <p>11 intention. I don't think he explained it very well,</p> <p>12 but I think that clearly was his intention.</p> <p>13 Q Let me ask you to turn to page 11, please.</p> <p>14 JUDGE GULIN: Before we leave this -- are</p> <p>15 you leaving this point? I just wanted to get some</p> <p>16 idea if you can tell me of the magnitude of this bias</p> <p>17 that you think exists. Do you understand what the</p> <p>18 3.75 percent adjustment that was made to Rosston</p> <p>19 entails, the adjustment for the 3.75? And you say</p> <p>20 basically, I think, that you would just not make the</p> <p>21 adjustment because you think that the bias that you</p> <p>22 speak of washes that. And that's what I am trying to</p>	<p style="text-align: right;">Page 10223</p> <p>1 to try to guess at it would be just I think wholly</p> <p>2 inappropriate.</p> <p>3 BY MR. HESTER:</p> <p>4 Q Well, I take it you would agree with me</p> <p>5 that the dummy variable correction part for the 3.75</p> <p>6 effect, you just think it doesn't go far enough?</p> <p>7 A Well, it creates a specification problem.</p> <p>8 I don't know about -- it certainly adjusts for the</p> <p>9 3.75 in some way. It doesn't do it correctly. The --</p> <p>10 probably your statement is correct. It doesn't go far</p> <p>11 enough. But I am always cautious about making</p> <p>12 predictions as to how it would work out in the absence</p> <p>13 of it.</p> <p>14 Q But this --</p> <p>15 JUDGE GULIN: If you agree with that, then</p> <p>16 I guess your statement that you would not give PTV the</p> <p>17 so-called 3.75 adjustment, I guess did you want to</p> <p>18 back off of that a little bit and --</p> <p>19 THE WITNESS: No, no. I didn't disagree.</p> <p>20 I agree that there is some adjustment because the 3.75</p> <p>21 variable is in there. But I also agreed to Mr.</p> <p>22 Hester's question that it doesn't -- probably doesn't</p>
<p style="text-align: right;">Page 10222</p> <p>1 get a sense of. You are saying that the bias rises to</p> <p>2 that extent?</p> <p>3 THE WITNESS: No. I am saying -- what I</p> <p>4 am saying is it isn't that they would not have</p> <p>5 something in there. Assuming that I were to go down</p> <p>6 this road of running this regression to start with, I</p> <p>7 wouldn't have it as an additive variable, but I would</p> <p>8 have it multiplicative times the size of the cable</p> <p>9 system or something like that because the effect of</p> <p>10 the 3.75 is multiplicative with the size of the cable</p> <p>11 system.</p> <p>12 It isn't just something you add on. You</p> <p>13 don't just add on a payment because you're 3.75. It</p> <p>14 multiples by the basic cable revenues.</p> <p>15 JUDGE GULIN: I am just trying to get a</p> <p>16 sense of the magnitude of the bias as it was performed</p> <p>17 by Dr. Rosston. Is there any way you can give me a</p> <p>18 sense of that?</p> <p>19 THE WITNESS: Well, there would be a way</p> <p>20 to do it, I suppose, and that is to estimate that in</p> <p>21 a fashion which I just suggested. I haven't done</p> <p>22 that. So I can't give you anything precise. For me</p>	<p style="text-align: right;">Page 10224</p> <p>1 do enough and that it undoubtedly -- undoubtedly</p> <p>2 remaining in there is an upward bias on the PTV share</p> <p>3 because of this commingling effect and the failure to</p> <p>4 take account properly of the 3.75.</p> <p>5 JUDGE GULIN: In paragraph 20, you say,</p> <p>6 "In question 8, the panel asks whether it would be</p> <p>7 necessary to give PTV a larger share of the Basic Fund</p> <p>8 than shown in Dr. Rosston's table in order for PTV to</p> <p>9 receive the share of the total royalty pool." In</p> <p>10 light of the PBS bias in the model, essentially giving</p> <p>11 PBS credit for 3.75 Fund payments, no such adjustment</p> <p>12 should be performed?</p> <p>13 THE WITNESS: Yes. Put it in quotes; that</p> <p>14 is, that their estimate is biased upward by the</p> <p>15 Rosston methodology.</p> <p>16 JUDGE GULIN: If the dummy variable partly</p> <p>17 accomplishes the bias, doesn't that indicate that</p> <p>18 still some sort of adjustment would be necessary to</p> <p>19 give PTV a larger share of the Basic Fund?</p> <p>20 THE WITNESS: How do we know that what is</p> <p>21 left doesn't double or treble the PTV share? We don't</p> <p>22 know that until we do it the right way. And, as I</p>

1 said, even the right way is probably not a very
2 appropriate way to think of this problem.

3 MR. HESTER: Let me walk through this
4 again.

5 BY MR. HESTER:

6 Q First of all, this point you're raising
7 about your view that the dummy variable isn't
8 sufficient, you refer to that as a specification
9 issue, I think?

10 A Yes.

11 Q That specification issue isn't unique to
12 public television somehow?

13 A No, it's not unique to public television.

14 Q You're talking about just the standard
15 question of specification errors that are present in
16 any regression analysis, questions that can be raised
17 about whether the model adequately predicts what is
18 purported to be predicted?

19 A But there are some which we -- we know
20 that there is a better answer, and we should do it the
21 right way. It is certainly true that you always have
22 some -- the entire economic problem correctly. And I

1 mentioned that earlier. But, at the very least, you
2 would want this thing to be multiplicative in the --

3 Q If you had a circumstance where you have
4 a particular set of observations in the Rosston study,
5 where you have a 3.75 signal being carried and two
6 independents and zero public television, right? In
7 that circumstance, PTV ends up with a zero for that
8 observation in terms of the way that would work in the
9 regression, right?

10 A It doesn't end up with a zero. It's just
11 irrelevant. That is, there is no PTV there in the
12 variable on the right-hand side. Yes, right.

13 Q Because the way the study works, it takes
14 a series of observations to estimate these
15 coefficients, right?

16 A Yes.

17 Q So you would have to have a circumstance,
18 even to get to this theoretical circumstance that you
19 are talking about, you would have to have both a PTV
20 distant signal and a 3.75 signal carried by the same
21 operator, right?

22 A In order for there to be an upward bias on

1 the PTV coefficient, yes, from this source.

2 Q You haven't checked for that, how many of
3 those there are?

4 A I have not.

5 Q The 3.75 adjustment that the panel asked
6 about involves a different question. It involves how
7 the Rosston results are to be applied to the Basic
8 Fund, right?

9 A Well, I guess we had better make clear
10 what we are talking about here. I am not sure. I
11 believe that's correct. I am not sure.

12 Q I was just trying to distinguish because
13 the bias you are talking about is a bias in the
14 coefficient estimated from the Rosston study for PTV,
15 right?

16 A Yes.

17 Q The panel's question relates to whether in
18 applying the Rosston results to the Basic Fund, there
19 needs to be an adjustment to take account of the fact
20 that PTV is not in the 3.75 Fund, right?

21 A Yes.

22 Q Okay. Those are not the same questions.

1 A Well, but one bears on the other. If, in
2 fact, the share from the Rosston regression is --
3 overstates the PTV share, then there is certainly much
4 less cause to adjust the share going to PTV for its --
5 the fact that it doesn't participate in the 3.75 pool.

6 Q You would need to know how many of the
7 sample observations included both a 3.75 Fund signal
8 and a PTV distant signal in order to make the judgment
9 you are making?

10 A No. I just need to know how much is the
11 bias in the estimating coefficient because that is
12 what is being used here.

13 Q You haven't estimated that?

14 A I have not.

15 Q And in terms of this impact or this
16 biasing effect, I think you would also agree with me
17 that the biasing effect applies across other
18 estimating coefficients in the equation? It's not
19 unique to PTV?

20 A Yes. I would think that it would lead to
21 a downward bias in those sorts of program types which
22 are important enough for cable systems that want to

<p style="text-align: right;">Page 10229</p> <p>1 pay this very large 3.75 rate and an upward bias in 2 the remainder in this low-power or Mexican or Canadian 3 and so forth.</p> <p>4 Q And those biases would occur only to the 5 extent that the dummy variable hasn't pulled them out?</p> <p>6 A Well, to the extent that you believe the 7 Rosston regression is valid in the first place, yes. 8 And then this issue goes to the specification error in 9 the 3.75 variable.</p> <p>10 JUDGE YOUNG: I am done with that, Judge. 11 Okay.</p> <p>12 BY MR. HESTER:</p> <p>13 Q Let me ask you to turn to page 11.</p> <p>14 A Uh-huh.</p> <p>15 Q Paragraph 24 is where you discuss briefly 16 Dr. Leland Johnson's testimony for public television.</p> <p>17 A Yes.</p> <p>18 Q And you have a sentence where you say that 19 Dr. Johnson's analysis is merely an alternative form 20 of the time studies. Do you see that?</p> <p>21 A Yes.</p> <p>22 Q It's the last sentence in the paragraph.</p>	<p style="text-align: right;">Page 10231</p> <p>1 Q Well, you know he was looking at 2 subscriber instances of carriage, maybe the same point 3 for what you are saying?</p> <p>4 A Yes, yes, weighted by subscribers but not 5 by viewing. There was more time available, rather 6 than time viewed.</p> <p>7 Q Right. And then he was undertaking to 8 assess after he developed those measures of relative 9 subscriber instances of carriage. He was undertaking 10 to assess what the relative values were of different 11 signals, correct?</p> <p>12 A He was attempting -- he was suggesting 13 that instances of carriage are proportional to value 14 and that you could somehow measure value by instances 15 of carriage.</p> <p>16 The fact that the same amount of carriage 17 is available to you or me of a PTV's station and 18 another type of signal doesn't mean to say that are of 19 equivalent value.</p> <p>20 Q Is your understanding that he was simply 21 purporting to pull the assumed value out of the 22 relative instances of carriage?</p>
<p style="text-align: right;">Page 10230</p> <p>1 A Yes.</p> <p>2 Q I take it you are aware that Dr. Johnson 3 spent a lot of time in his testimony and I will say 4 outside of his testimony thinking about this question 5 of whether there was parity in the value of different 6 signals carried distantly. Do you know that?</p> <p>7 A Well, I read both Dr. Johnson's testimony 8 in the direct proceeding and then, of course, he also 9 submitted something in rebuttal testimony. I am only 10 addressing the former here, not the latter, in this 11 testimony. But I am aware that he did talk a lot 12 about parity, yes.</p> <p>13 Q So he was undertaking to assess the 14 relative value of different signals carried, correct?</p> <p>15 A Well, he was trying to find a proxy for 16 value, but I don't believe it reflects value.</p> <p>17 Q He was not merely looking at time to 18 discern relative value?</p> <p>19 A Well, in a sense, he was because he was 20 using instances of carriage in his original testimony. 21 And that's proportional to the amount of time that is 22 occupied on the importing cable system.</p>	<p style="text-align: right;">Page 10232</p> <p>1 A Well, he was relating it to the award in 2 the '90-'92 proceeding.</p> <p>3 Q And that was based on relative values?</p> <p>4 A And he was claiming that movements in 5 instances, relative instances, of carriage of 6 commercial and noncommercial stations would reflect 7 relative changes in value. And I don't think there is 8 any theoretical relationship necessarily between the 9 two.</p> <p>10 Q You know, he started. He had an anchor 11 based on the '90 to '92 CARP award?</p> <p>12 A Yes. That's what I said.</p> <p>13 Q And that was based on the relative 14 marketplace valuations that the CARP made in that 15 proceeding?</p> <p>16 A Yes.</p> <p>17 Q And then he applied that relative 18 marketplace valuation to the instances of carriage 19 data?</p> <p>20 A Yes, thereby assuming that changes in 21 instances of carriage are a reflection of changes in 22 relative value. And that's where I have difficulty.</p>

<p style="text-align: right;">Page 10233</p> <p>1 And that's where in my testimony I claim that there is 2 no relationship necessarily. 3 Q Okay. That's the point. 4 A Yes. 5 Q I wanted to understand. That is the point 6 you are making? 7 A Precisely. 8 MR. HESTER: All right. Those are all the 9 questions I have. Thank you, Dr. Crandall. 10 THE WITNESS: Thank you. 11 JUDGE von KANN: Any other party have any 12 cross-examination? Ms. Witschel? 13 MS. WITSCHEL: I have a very few minutes. 14 JUDGE von KANN: How about five minutes? 15 Good. Why don't you do it? Come on up. 16 MR. STEWART: Your Honor, I am sorry to 17 raise this belatedly, but my two exhibits 55-RX and 18 56-RX I intended to offer on the same basis that Mr. 19 Garrett yesterday offered some public filings. And it 20 wasn't clear to me how that came out through official 21 notice as to the fact that these are on file, making 22 the statements that they made. And they need to be</p>	<p style="text-align: right;">Page 10235</p> <p>1 research survey is a research tool, right? 2 A A research tool? What do you mean by "a 3 research tool"? 4 Q Well, the panel question that you address 5 at page 1 of your testimony is whether the Bortz 6 survey provides an accurate measurement of the 7 decisions that buyers would make in a free market? 8 A Yes. 9 Q Isn't it more accurate to say that the 10 Bortz survey is an approximation of how the cable 11 operators would like to spend their money if they had 12 a free market? 13 A It's an estimate of what they believe they 14 would spend if they had the option to bury their 15 budget across these program categories given what they 16 are currently importing on distant signals. 17 So if you want to call that a research 18 tool, it is an approach to trying to find out what the 19 relative values are from a major player in this entire 20 proceeding, namely the cable operator who is paying 21 for this stuff. 22 Q The point of my question is, is that an</p>
<p style="text-align: right;">Page 10234</p> <p>1 moved. 2 So either I would ask for clarification or 3 I would -- 4 JUDGE von KANN: I think they were offered 5 and received "for impeachment." If what you wish is 6 that the record reflects that these documents were, in 7 fact, filed by the authoring parties in their 8 statements of position by them, I assume that's not 9 objected to, not for the truth of the content but for 10 the fact that they took those positions. 11 MR. GARRETT: That is my understanding, 12 Judge. 13 MR. STEWART: Thank you. 14 JUDGE von KANN: Okay. Music? 15 MS. WITSCHEL: Good afternoon, Dr. 16 Crandall. I am Carol Witschel. We did meet before. 17 THE WITNESS: Yes. 18 MS. WITSCHEL: Here we go again. 19 THE WITNESS: How are you? 20 CROSS-EXAMINATION 21 BY MS. WITSCHEL: 22 Q You would agree with me that the Bortz</p>	<p style="text-align: right;">Page 10236</p> <p>1 estimate or an approximation, rather than some finely 2 tuned measurement? 3 A Well, I think in my direct testimony 4 earlier in this proceeding, I pointed out that most 5 numbers we use as direct evidence of something going 6 on in the world have a measurement error as well. 7 This obviously is an estimate that a cable 8 operator makes knowing what knows. But he has the 9 best information. And there is no other information 10 on this available that you can actually get 11 transaction prices from. 12 Q Okay. And, if I understand the Bortz 13 survey correctly, they asked the cable operators how 14 they would divide up the budget essentially if they 15 could choose the programming categories a la carte, 16 right? 17 A Well, I think the intent was to ask them 18 how they would divide up their program budget for the 19 programming that they currently import, the array of 20 distant signal programming they currently import, and 21 what they would pay for it and how they value that. 22 That was my discussion, I believe, with --</p>

1 I can't remember -- Mr. Hester, yeah, just a few
2 minutes ago, that it is not asking them now, "What
3 would you actually import? And how different would
4 that be from what you currently import?" but, rather,
5 the linchpin is what you currently import.

6 Q The specific question is, if you had a
7 fixed dollar amount to spend to acquire all of the
8 programming actually broadcast in 1998 on the
9 particular form I am reading, what percentage of the
10 fixed dollar amount would you spend on each type of
11 programming?

12 A Programming is fixed.

13 Q Now, the types of programming are fixed.

14 A Well, I think the intent of that question
15 is that the programming is fixed. Now, it is possible
16 that the -- we may be talking about some slight shift
17 in what kind of syndicated programming and what kind
18 of motion pictures or what kind of sports, but it's --
19 the intent is to measure the value of that which they
20 currently import, as I understand it.

21 Q In the same amounts?

22 A In the same relative amounts, yes.

1 Q And you say on page 1 of your testimony
2 that the panel should assess the value of the
3 programming that was actually purchased?

4 A Yes.

5 Q And by that, you mean the programming that
6 was actually carried on the distant signals that is
7 compensable in this proceeding, right?

8 A Yes.

9 Q And, therefore, it was appropriate for the
10 Bortz survey to tell the cable operators when they
11 were asking the questions to exclude from their
12 estimates the value of any programming that was on the
13 national networks, ABC, NBC, or CBS, right?

14 A Yes.

15 Q Now, in an actual market negotiation --
16 and I think we are on the same page now -- you agree
17 that the cable operator would be purchasing the whole
18 channel? It wouldn't be able to buy these categories
19 a la carte? They would have to either take or leave
20 a whole station?

21 A Electronics has made a substantial move
22 forward. They might be able to change it. They might

1 be able to block certain things fairly easily. It's
2 hard to imagine.

3 But in the exercise that I understand we
4 are engaged in here and the Bortz survey is certainly
5 engaged in, it is to assume the programming is the
6 current programming, the 1998-1999 programming, is it
7 actually was imported. It would not be changes in
8 that.

9 Q And just all the same programs in all the
10 same amounts, right?

11 A Yes, the same relative amounts. Yes.

12 Q So does the Bortz survey already take time
13 into consideration?

14 A Take time into consideration.

15 Q The Fratrik study for trying to allocate
16 the fees paid based on how much time the shows are on.
17 If I am understanding your testimony, the Bortz survey
18 already takes into consideration the relative amount
19 of time each of the programs are on TV?

20 A Oh, certainly. The cable operator must
21 understand and has in his mind what he is actually
22 importing, how many hour of various programming he

1 has. But what he is not doing and what the results of
2 the survey clearly show that he is not doing is
3 assigning the same value to each hour that he imports.

4 Q Now, in an actual market situation, before
5 the cable operator decided to take or leave any
6 particular channel, isn't it true that he would look
7 at Nielsen viewing data?

8 A He may or may not. I'm not sure that he
9 would. I think he -- as a cable operator, he would
10 look at the type of programming and ask whether that
11 programming would, in fact, be done to his advantage
12 in an ability to charge more or greater number of
13 subscribers.

14 And that may or may not be co-linear with
15 a Nielsen rating because it may well be that highly
16 rated Nielsen programming is duplicative of what he
17 already has on and would not attract many subscribers.
18 I don't know. He probably has some idea of that, yes.

19 Q You have a lot of experience with the
20 cable and broadcast industries, right, Dr. Crandall?

21 A I have experience as a student of them,
22 not in actually operating a cable system.

<p style="text-align: right;">Page 10241</p> <p>1 Q In your knowledge and experience, isn't it 2 true that the cable operators would see what people 3 are watching in making decisions as to what they want 4 to buy? 5 A Well, but what they are really concerned 6 about is what will add to the value of the cable 7 signal. It may well be that something that attracts 8 my wife to actually turn the television set on at 9 night, which may be a very low-rated programming, 10 would be of greater value to them than simply 11 duplicating, you know, more reruns of I Love Lucy or 12 Cheers, which may be highly rated programs. 13 And that's what's been at the core of the 14 study of cable television for a long time; that is, 15 that they don't want to just duplicate. They want to 16 expand their audience base. 17 MS. WITSCHER: Thank you, Dr. Crandall. 18 I have no further questions. 19 JUDGE von KANN: Any other cross from 20 anyone? 21 (No response.) 22 JUDGE von KANN: Okay. I think this is</p>	<p style="text-align: right;">Page 10243</p> <p>1 to the program category that has the greatest volume 2 vis-a-vis the other categories. Have you considered 3 that? 4 THE WITNESS: I haven't considered whether 5 it would really create a bias across categories. A 6 lot has to do with the price sensitivity of demand for 7 each category is, and I think I mentioned in my 8 original testimony in testimony in previous 9 proceedings that as long as the price elasticity is 10 relatively the same, then estimates of total value and 11 marginal value will be proportional to one another, so 12 that isn't a problem. But whether in the precise way 13 in which Rosston estimates his linear regression model 14 this is the case, I don't know. I'd have to look at 15 specifically what that witness said and why that would 16 be true. 17 JUDGE von KANN: One other thing. I guess 18 I had said I would check with you all after lunch to 19 see if you had any consensus on the format of oral 20 argument. I don't know if you'd done anything about 21 over lunch. Well, why don't we pass that and we can 22 poll you in the morning, so you can talk about it at</p>
<p style="text-align: right;">Page 10242</p> <p>1 the time to break for lunch. And we will come back at 2 2:05 for redirect. 3 (Whereupon, at 1:07 p.m., the foregoing 4 matter was recessed for lunch, to 5 reconvene at 2:05 p.m. the same day.) 6 JUDGE von KANN: Okay. Judge Gulin has a 7 question before we get into redirect. 8 JUDGE GULIN: One question before we get 9 to redirect. Dr. Crandall, another witness expressed 10 a criticism of the Rosston analysis that you did not 11 address, but since we've got you here maybe I can run 12 it by you. And that was that Rosston, as I appreciate 13 it, seeks to determine the marginal value of an 14 additional minute of programming for each of the 15 program categories, correct? 16 THE WITNESS: Yes. Yes. 17 JUDGE GULIN: Okay. And the criticism was 18 that marginal value as an economic matter is always 19 greater -- or generally greater than total value. 20 THE WITNESS: It's the other way around. 21 JUDGE GULIN: Less so than total value. 22 And that, therefore, that creates a bias with respect</p>	<p style="text-align: right;">Page 10244</p> <p>1 the end of the day. Okay. Mr. Garrett? 2 REDIRECT EXAMINATION 3 BY MR. GARRETT: 4 Q Dr. Crandall, just to clarify a couple of 5 issues here, one, are you urging that the CARP take 6 account of the seller's perspective for supply side 7 considerations in determining royalty awards in this 8 proceeding? 9 A No. 10 Q Are you advocating that the CARP adjust 11 the Bortz results in some way to take account of 12 seller's perspective for supply side considerations? 13 A No. 14 Q Now, you're aware that the CRT in the 15 past, in the prior CARP have taken and determined that 16 the seller side and the supply side consideration are 17 relevant in determining royalty awards here. 18 A Yes. 19 Q Okay. And you're aware that prior CRTs 20 and CARPs have placed somewhat less reliance upon 21 Bortz because it did not take account of the seller's 22 perspective, right?</p>

<p style="text-align: right;">Page 10245</p> <p>1 A Yes, I am.</p> <p>2 Q And they've always referred to supply side</p> <p>3 considerations in not giving full weight to the Bortz</p> <p>4 study, right?</p> <p>5 A Yes.</p> <p>6 Q Now, assuming that the CARP in this</p> <p>7 proceeding follows that past precedent, how do seller</p> <p>8 side considerations impact the awards of -- well,</p> <p>9 before I get to that, you also described in your</p> <p>10 earlier testimony here certain concerns you had with</p> <p>11 what the CRT and the CARP have done on this supply</p> <p>12 side issue vis-a-vis the Bortz study; do you recall</p> <p>13 that?</p> <p>14 A Yes.</p> <p>15 Q Could you just briefly articulate what</p> <p>16 that position is?</p> <p>17 A Well, it was that if the Panel or the</p> <p>18 Tribunal were to criticize the Bortz study because it</p> <p>19 did not fully take into the account the supply side or</p> <p>20 the seller's perspective, they had no evidence, no</p> <p>21 basis for the adjustments they made. They adjusted</p> <p>22 the Sports share down from what the Bortz estimates</p>	<p style="text-align: right;">Page 10247</p> <p>1 sports leagues have advocated policies that would have</p> <p>2 the result of lowering the copyright royalties paid?</p> <p>3 A No, I'm not.</p> <p>4 Q And when I say copyright royalties, I'm</p> <p>5 referring to the royalties paid pursuant to Section</p> <p>6 111. Do you understand that?</p> <p>7 A Yes.</p> <p>8 Q Are you aware of any instances where the</p> <p>9 sports leagues have sought policies that would result</p> <p>10 in lowering of cable rates which in turn would lower</p> <p>11 the amount of royalties paid, pursuant to Section 111?</p> <p>12 A No, I'm not.</p> <p>13 Q I direct your attention to one of the</p> <p>14 documents that Mr. Stewart had asked you to look at,</p> <p>15 which is Exhibit 55-RX. Do you have that before you?</p> <p>16 A I don't have it numbered. Is this the one</p> <p>17 for Major League Baseball?</p> <p>18 Q Yes. This is the petition for</p> <p>19 clarification or partial reconsideration filed by</p> <p>20 Baseball.</p> <p>21 A Okay.</p> <p>22 Q Had you seen that document prior to today?</p>
<p style="text-align: right;">Page 10246</p> <p>1 suggested, but as far as I could see in their</p> <p>2 decision, there was no reason why they shouldn't have</p> <p>3 adjusted it upward. There was no basis for adjusting</p> <p>4 it down.</p> <p>5 Q So if this Panel takes -- follows that</p> <p>6 past precedent, takes account of the seller's side in</p> <p>7 evaluating the Bortz result, how should that be -- the</p> <p>8 Sports award compare to the award for Local Commercial</p> <p>9 Television?</p> <p>10 A Well, in my testimony, I pointed that in</p> <p>11 the past Commercial Broadcasters had in fact supported</p> <p>12 policies which would reduce the total copyright</p> <p>13 royalty pool because they had an incentive to obtain</p> <p>14 greater carriage of the broadcast signals relative to,</p> <p>15 say, basic cable networks. That is certainly not the</p> <p>16 case with the Sports -- Joint Sports Claimants. They</p> <p>17 have no particular interest in offering their</p> <p>18 programming at lower rates. If anything, I believe</p> <p>19 there's a substantial possibility they would insist on</p> <p>20 substantially higher rates than the current copyright</p> <p>21 royalty rate schedule.</p> <p>22 Q Are you aware of any instances where the</p>	<p style="text-align: right;">Page 10248</p> <p>1 A I don't believe so. I'm not going to say</p> <p>2 I haven't, but I don't believe so, unless it was in</p> <p>3 this proceeding earlier. Otherwise I would not have</p> <p>4 seen it, no.</p> <p>5 Q Okay. Were you at all familiar with the</p> <p>6 issue that was -- or with the position that Baseball</p> <p>7 was taking in that proceeding?</p> <p>8 A I was not familiar with the position</p> <p>9 Baseball was taking. I was familiar with the issue,</p> <p>10 with the general issue.</p> <p>11 Q Okay. And the general issue was what?</p> <p>12 A Was whether the FCC had set rates for</p> <p>13 incremental channels on cable tiers that were</p> <p>14 compensatory which would provide a sufficient</p> <p>15 incentive for cable systems to carry new channels.</p> <p>16 Q Okay. And when you refer to new channels</p> <p>17 there was cable programming that was at issue in this</p> <p>18 -- the carriage of cable programming, right?</p> <p>19 A Yes. Yes.</p> <p>20 Q And, specifically, it was not the carriage</p> <p>21 of either local or distant broadcast signals, correct?</p> <p>22 A That's correct.</p>

Q And the position articulated by Baseball in this proceeding would in fact have had the effect of permitting cable operators to increase the rates that they would charge for their services, correct?

A That's certainly the implication of what they're saying on Page 2 of that document, yes.

Q All right. With the notion that those increased rates that Baseball -- or rather sports leagues would receive additional compensation from cable operators, right?

A I presume that was the motive.

Q Right. Is it fair to say that the position -- well, how would you relate the position that Baseball was taking in this proceeding that Mr. Stewart referenced with positions that broadcasters had taken with regard to regulation?

A Well, as I mentioned in my testimony and my colloquy with Mr. Stewart, the broadcasters had supported actually reducing cable rates rather substantially. Whereas here we have the Major League Baseball suggesting that the rates are not compensatory and don't provide sufficient incentive

new channel. Whereas the broadcasters were attempting to lobby for lower basic cable rates during this time period in order to get greater carriage for their advertiser-supported programming on cable systems.

Q Okay. Now, let me ask you to turn to 56-RX. Those are the comments filed by the NBA and the NHL; is that right?

A Okay. Yes. I have them.

Q And I'll just direct your attention to Pages 3 to 4.

A Yes.

Q Have you had a chance to look at that? Now, had you seen this document prior to it being shown to you this morning?

A I'm rather certain I have never seen this document.

Q Okay. So you were not involved in any way in the preparation of this document then.

A No.

Q Are you familiar with the issues that were being debated during the proceeding which these comments were filed?

for the carriage of additional channels.

Q Now, there's a statement here at the bottom of Page 1 to the effect that, "Baseball has a strong interest ensuring that its programming," and you understand that to be the cable programming referenced here?

A Well, it says its programming. I presume that it means all programming, including cable which is what is at issue in this document.

Q That its programming reaches the largest number of viewers possible. Do you see that?

A Yes.

Q How does Baseball's interest in that regard differ, if at all, from interest that a broadcaster might have?

A Well, the cable companies -- excuse me, the sports leagues want to get the largest number of viewers but at compensatory, at substantial rates. Here they are suggesting that the rates being allowed on cable were not high enough to make it possible, apparently, for them to put together some package that would become a new network and obtain carriage on this

A Well, only vaguely. I think in my colloquy to Mr. Stewart I indicated that I had never gotten much involved with the definition of what constituted a local market back when I was studying cable television.

Q Okay. All right. In the first section here on the definition of a local commercial station, do you see that?

A Yes.

Q There's the discussion of the circumstances under which a station could be considered local as opposed to distant; do you understand that?

A Yes.

Q And is it your understanding that what the NBA and the NHL were advocating is a policy that would have ensured -- that would have restricted the number of instances in which a station might be considered local?

A Yes.

Q And what would the effect of that be vis-a-vis copyright royalties?

1 A Well, they would mean that in more
2 instances they'd be considered an imported distant
3 signal and therefore subject to copyright payment.

4 Q Is it fair to say that the vision they
5 were articulating here was one that was designed to
6 increase the amount of royalties to be paid pursuant
7 to Section 11?

8 A Yes. It seems to me that's what they're
9 saying in the middle of Page 4.

10 Q All right. And that's in contrast to the
11 position that the broadcasters have taken on similar
12 kinds of issues.

13 A Well, in contrast to positions that the
14 broadcasters have taken which were lower in copyright
15 royalties. This would actually lead to maintenance
16 and no decline in copyright royalties.

17 Q Okay. Now, the second issue that's
18 addressed in this document is request or add
19 communities to or delete communities from a television
20 market; do you see that?

21 A Yes.

22 Q Do you have some general familiarity with

1 both royalty payments as well as ensuring carriage
2 within the sports team's home market?

3 A Well, certainly, by them taking control of
4 what is a local and what is a distant signal allows
5 sports leagues to attempt to in fact have higher rates
6 for importing distant signals and distant market
7 teams' signals into the market, and in fact they have
8 every incentive to keep those rates rather high in
9 order to make sure that we don't have a country in
10 which everybody's watching just the Atlanta Braves and
11 New York Yankees and there's not a competitive league
12 as a result.

13 Q Okay. Let me ask you -- I'm going to mark
14 as Rebuttal Exhibit 6-R, John?

15 (Whereupon, the above-referred
16 to document was marked as
17 JSC Exhibit No. 6-R for
18 identification.)

19 Q Six-R is the written testimony of Edward
20 O. Fritts, President and CEO, National Association of
21 Broadcasters, before the Senate Judiciary Committee,
22 April 6, 1992. This was three years after the

1 the issue that was being discussed here?

2 A Well, I understand generally the issue.
3 I don't know the specifics of what they were
4 suggesting, other than what I've read in this
5 document.

6 Q Okay. What would be the effect of
7 deleting a community from a station's ADI market vis-
8 a-vis the Copyright Royalty Fund?

9 A Well, if it was shifted from one market to
10 another, then the carriage by that -- by a cable
11 system in the market to which it was added as a local
12 signal would not be compensable under the compulsory
13 copyright license system.

14 Q All right. So if a broadcaster, for
15 example, sought to have a particular market declared
16 within the ADI, that would reduce the potential
17 royalties paid to that signal?

18 A If it were considered a local signal for
19 distant signal purposes, yes.

20 Q All right. Do you understand that by
21 giving sports leagues some control over what is in or
22 outside a local ADI, that that also has an impact on

1 testimony that Mr. Stewart had referred to earlier.

2 First of all, Dr. Crandall, you're
3 familiar with Mr. Fritts?

4 A I remember his vaguely. That's 11 years
5 ago.

6 Q Is he still with us?

7 A I don't know. I'm not as much involved in
8 these issues today, Mr. Garrett.

9 Q All right. You're aware, though, that he
10 was the President and CEO of the National Association
11 of Broadcasters here back in the early '90s?

12 A Unless he mischaracterized his position in
13 this document, yes.

14 Q Okay. Are you aware that the conventional
15 broadcasters have opposed elimination of the
16 compulsory license?

17 A That's my understanding from just a quick
18 reading of the newspapers, yes.

19 Q How does that fact relate to the seller's
20 perspective here?

21 A Well, if in fact the broadcasters want to
22 continue this system but other claimants, such as the

<p style="text-align: right;">Page 10257</p> <p>1 Sports Claimants or perhaps the motion picture 2 companies do not, would suggest to me as an economist 3 that the latter think that they can obtain much higher 4 rates or better compensation in the absence of the 5 compulsory copyright system despite the transactions 6 cost and would prefer that system. Whereas, 7 apparently the NAB does not think that that would be 8 the case for them.</p> <p>9 Q Let me just ask you to turn to Page 21 of 10 Mr. Fritts' statement, which is Page 191 of the -- up 11 at the top of this document; do you see that?</p> <p>12 A Yes.</p> <p>13 JUDGE von KANN: In regard to your last 14 answer, does the fact that one who might oppose the 15 elimination of a system other groups favor suggest 16 that they've made different calculations about whether 17 they can improve their royalty revenues by getting out 18 from under a compulsory license or rather improve 19 their profits generally? It strikes me that one might 20 say, "Well, I don't know, royalty payments will stay 21 about the same but we'll be able to sell more 22 advertising or we'll be able to do this or do that.</p>	<p style="text-align: right;">Page 10259</p> <p>1 look for other ways to distribute their product at 2 higher rates. They wouldn't offer the same deal or 3 they get the same carriage and they wouldn't be able 4 to shift.</p> <p>5 JUDGE von KANN: Okay.</p> <p>6 BY MR. GARRETT:</p> <p>7 Q Just ask you to turn to Page -- well, the 8 page I asked you to turn to earlier.</p> <p>9 A Twenty-one is what you asked me to turn 10 to.</p> <p>11 Q Thank you. Down at the bottom of that 12 page --</p> <p>13 JUDGE von KANN: Bottom of which page, Mr. 14 Garrett?</p> <p>15 MR. GARRETT: It was Page 21 on Mr. 16 Fritts' statement and 191 of the transcript. See, it 17 says, "Elimination of the compulsory license would, 18 however, result in significant dislocations in the 19 current marketplace," do you see that?</p> <p>20 THE WITNESS: Where are you pointing to 21 now, I'm sorry?</p> <p>22 BY MR. GARRETT:</p>
<p style="text-align: right;">Page 10258</p> <p>1 So, on balance, we'll come out better if we don't have 2 a compulsory license system." I wouldn't have thought 3 that the calculus would be based solely on this piece 4 of their profit structure which is after all a 5 relatively small part of their profit structure.</p> <p>6 THE WITNESS: Well, I think that's 7 correct. I think that probably what they would do is 8 raise their demands for compensation for similar sorts 9 of carriage, and indeed it might lead to lower 10 carriage through this medium and a shift to other more 11 lucrative ways of distributing the product. But this 12 suggests they want a higher price than a lower price.</p> <p>13 JUDGE von KANN: Or that somehow or other 14 they've concluded that getting out from under this 15 will ultimately increase their overall profit in some 16 fashion, perhaps some alternative revenue sources or 17 I don't know what.</p> <p>18 THE WITNESS: Yes, but I think -- but it 19 would -- it seems to me logic would compel you to 20 think that they believe they would then raise the 21 price for the current form of distribution, perhaps 22 making it unattractive for someone to carry it and</p>	<p style="text-align: right;">Page 10260</p> <p>1 Q Down at the very -- the final -- you're on 2 Page 21?</p> <p>3 A Page 21, yes. "The compulsory license 4 deserves reexamination."</p> <p>5 Q Right.</p> <p>6 A Right.</p> <p>7 Q All the way down at the bottom there.</p> <p>8 A Yes. Oh, I see, yes. Okay. Okay.</p> <p>9 Q "Will result in significant dislocations 10 in the current marketplace;" do you see that?</p> <p>11 A Right.</p> <p>12 Q And the NAB goes on over the next couple 13 of pages to talk about those dislocations and the 14 limited respects in which the compulsory license ought 15 to be reexamined; do you see that?</p> <p>16 A Yes.</p> <p>17 Q For example, on the very next page, 22, 18 there's a discussion there about restricting -- I'm 19 sorry, broadening the definition of local market, do 20 you see that, the paragraph beginning, "Further?"</p> <p>21 A Yes. Yes, I do.</p> <p>22 Q "An action that would have, and in fact</p>

<p style="text-align: right;">Page 10261</p> <p>1 has, resulted in reduction of copyright royalties,"</p> <p>2 correct?</p> <p>3 A Yes, it would.</p> <p>4 Q All right. Now, just turn over to Page 24</p> <p>5 and look at that first paragraph up at the top. Do</p> <p>6 you see they talk about another dilemma that repeal of</p> <p>7 the compulsory license would have on sports</p> <p>8 programming; do you see that?</p> <p>9 A Certainly. Yes.</p> <p>10 Q And then there's a statement, "National</p> <p>11 and regional superstations which have grown up under</p> <p>12 the compulsory license often find their strongest</p> <p>13 appeal to viewers generated by their carriage of</p> <p>14 sporting events." Do you see that?</p> <p>15 A Yes.</p> <p>16 Q And it talks about the effect of</p> <p>17 eliminating the compulsory license might be to reduce</p> <p>18 or eliminate the number of sports telecasts; do you</p> <p>19 see that?</p> <p>20 A Yes. Yes.</p> <p>21 Q The statement there that Mr. Fritts makes,</p> <p>22 "Given the firm position of the sports leagues that</p>	<p style="text-align: right;">Page 10263</p> <p>1 and export it to markets in which there are other</p> <p>2 teams thereby reducing the value of the sports rights</p> <p>3 in those markets. And what the leagues would like to</p> <p>4 do is to gain control over their entire broadcasting</p> <p>5 package to limit these overlaps and limit the</p> <p>6 reduction in value that this causes.</p> <p>7 Q Now, how do those considerations for</p> <p>8 sports leagues differ, if at all, from considerations</p> <p>9 that like a broadcaster would have in seeking distant</p> <p>10 carriage?</p> <p>11 A Well, it suggests that the sports leagues</p> <p>12 would clearly want higher prices, would get greater</p> <p>13 rates and would insist on much greater rates for that</p> <p>14 type of carriage to the extent that apparently the</p> <p>15 President of the National Association of Broadcasters</p> <p>16 believes that there would be substantially less</p> <p>17 carriage on superstations because the price would be</p> <p>18 too high.</p> <p>19 MR. GARRETT: Okay. I move 6-R under the</p> <p>20 conditions that we're applying to all of this.</p> <p>21 JUDGE von KANN: As evidence that these</p> <p>22 statements were made to Congress.</p>
<p style="text-align: right;">Page 10262</p> <p>1 national and regional distribution of televised games</p> <p>2 under the compulsory license reduces their ability to</p> <p>3 obtain full value for the television rights to many</p> <p>4 local events, it is reasonable to expect that the end</p> <p>5 of the compulsory license would be the effective end</p> <p>6 to superstations or at least of professional sports in</p> <p>7 distant signals." Do you see that?</p> <p>8 A Yes.</p> <p>9 Q Fair to say that one of the arguments that</p> <p>10 the broadcasters have given for the continuation of</p> <p>11 the compulsory license is the importance of getting</p> <p>12 continued sports on those distant signals?</p> <p>13 A I'm sorry, ask the question again.</p> <p>14 Q Well, let me ask you this, that statement,</p> <p>15 "Given the firm position of sports leagues here," do</p> <p>16 you see that?</p> <p>17 A Yes.</p> <p>18 Q How does that relate to the seller's</p> <p>19 perspective issues here?</p> <p>20 A Well, what this suggests is that these</p> <p>21 compulsory copyright rates that superstations have the</p> <p>22 ability to obtain this value of the sports programming</p>	<p style="text-align: right;">Page 10264</p> <p>1 MR. GARRETT: These statements were made</p> <p>2 to Congress.</p> <p>3 MR. STEWART: No objection.</p> <p>4 JUDGE von KANN: So received.</p> <p>5 (Whereupon, the above-referred</p> <p>6 to document, previously marked</p> <p>7 as JSC 6-R for identification,</p> <p>8 was received into evidence.)</p> <p>9 MR. GARRETT: I'd like to have another</p> <p>10 exhibit to be marked as 7-R.</p> <p>11 (Whereupon, the above-referred</p> <p>12 to document was marked as</p> <p>13 JSC Exhibit No. 7-R for</p> <p>14 identification.)</p> <p>15 MR. GARRETT: These are reply comments of</p> <p>16 the Association of Local Television Stations in</p> <p>17 Copyright Office Docket RM97-1 dealing with the</p> <p>18 revision of the cable and satellite compulsory</p> <p>19 licenses.</p> <p>20 Now, Dr. Crandall, are you familiar with</p> <p>21 the thought that in 1997 the Copyright Office, at the</p> <p>22 request of Congress, undertook an inquiry into the</p>

<p style="text-align: right;">Page 10265</p> <p>1 cable and satellite compulsory licenses?</p> <p>2 THE WITNESS: Only vaguely, but I'm aware</p> <p>3 of it, yes.</p> <p>4 BY MR. GARRETT:</p> <p>5 Q All right. And are you aware that one of</p> <p>6 the issues that was discussed in that proceeding was</p> <p>7 whether or not the cable and satellite compulsory</p> <p>8 licenses should continue?</p> <p>9 A I believe that's correct, but as I say,</p> <p>10 I'm only vaguely aware of the whole proceeding.</p> <p>11 Q All right. You're aware that the motion</p> <p>12 picture interest and the music interest and the sports</p> <p>13 interest all strongly advocated the elimination of the</p> <p>14 cable compulsory license?</p> <p>15 A That's my understanding, yes.</p> <p>16 Q And that the commercial and non-commercial</p> <p>17 broadcasters took an opposing view on that.</p> <p>18 A I believe that's correct.</p> <p>19 Q All right. And the Association of Local</p> <p>20 Television Stations is a trade association that</p> <p>21 represents individual television stations who are not</p> <p>22 affiliated with the ABC, NBC and CBS network</p>	<p style="text-align: right;">Page 10267</p> <p>1 BY MR. GARRETT:</p> <p>2 Q "Under Section 325(b) of the</p> <p>3 Communications Act," do you see that?</p> <p>4 A Yes.</p> <p>5 Q Go down a couple of more lines. It says,</p> <p>6 "In acquiring rights, a station must compete in a</p> <p>7 highly competitive market. However, when it turns to</p> <p>8 resell those rights, it is facing a single monopoly</p> <p>9 buyer in the local cable system;" do you see that?</p> <p>10 A Yes.</p> <p>11 Q And you discussed with Mr. Stewart here</p> <p>12 about having to deal with a cable system that is a</p> <p>13 monopolist; do you recall that?</p> <p>14 A Yes. Monopsonist, I guess, would be the</p> <p>15 better term, yes.</p> <p>16 Q In the next line there they say, "Stations</p> <p>17 easily might end up gaining little compensation for</p> <p>18 rights obtained at a considerable cost and would be</p> <p>19 caught in the middle, forced to buy high and sell low</p> <p>20 to assure the continued availability of its entire</p> <p>21 broadcast schedule." How does that view specified by</p> <p>22 the broadcasters then relate to this issue of seller's</p>
<p style="text-align: right;">Page 10266</p> <p>1 affiliates. Are you familiar with them?</p> <p>2 A Yes.</p> <p>3 Q We have here the reply comments where they</p> <p>4 respond in part to arguments that were raised by the</p> <p>5 sports interests, and the first being on Pages 1 and</p> <p>6 going to Page 4 and then to the MPAA being on Page 4;</p> <p>7 do you see that?</p> <p>8 A Yes.</p> <p>9 Q Let me just ask you to turn to Page 5 and</p> <p>10 Footnote 11 in particular.</p> <p>11 A Yes.</p> <p>12 Q And the Chair of the ALTV raises questions</p> <p>13 about -- I mean in order to support their argument</p> <p>14 that the compulsory license should continue, they</p> <p>15 discuss what would happen in a marketplace absent</p> <p>16 compulsory licenses; do you see that?</p> <p>17 A Yes.</p> <p>18 Q And you see there in the third line their</p> <p>19 statement, "Consequently, local stations rarely have</p> <p>20 secured monetary consideration from cable systems for</p> <p>21 granting retransmission consent under Section --</p> <p>22 PARTICIPANT: Slow down.</p>	<p style="text-align: right;">Page 10268</p> <p>1 perspective or supply side?</p> <p>2 A Well, it suggests that this group of</p> <p>3 stations in particular believes that as a result of an</p> <p>4 experiment that had been connected up to that time,</p> <p>5 '97, under the '92 Act, namely the retransmission</p> <p>6 consent exercise, that they had been singularly</p> <p>7 unsuccessful in obtaining remuneration for their</p> <p>8 signals and that they would be forced to continue to</p> <p>9 sell them at virtually zero price even though they had</p> <p>10 paid substantial amounts for the copyrighted material</p> <p>11 in their programming.</p> <p>12 Q And this was to ensure -- they would do so</p> <p>13 in order to ensure the continued carriage of those</p> <p>14 signals?</p> <p>15 A Well, in order to ensure that they have a</p> <p>16 broadcast lineup that people will watch in the non-</p> <p>17 cable market as well. I mean they have to offer a</p> <p>18 product that people will watch.</p> <p>19 MR. GARRETT: I move 7-R.</p> <p>20 JUDGE von KANN: Mr. Stewart?</p> <p>21 MR. STEWART: I have no objection.</p> <p>22 JUDGE von KANN: All right. Received</p>

<p style="text-align: right;">Page 10269</p> <p>1 again, I guess, as evidence that these statements were 2 made. 3 (Whereupon, the above-referred 4 to document, previously marked 5 as JSC 7-R for identification, 6 was received into evidence.) 7 BY MR. GARRETT: 8 Q Let me -- you had a discussion with Mr. 9 Hester about Dr. Rosston's regression analysis and how 10 Dr. Rosston treated 3.75; do you recall that? 11 A Yes. 12 Q And you had laid out in your testimony an 13 example of how the Rosston regression analysis works 14 in the case of carriage of a PTV signal and a 3.75 15 signal; do you recall that? 16 A Yes. 17 Q And you were asked some questions about 18 the impact that -- whether the concern that you 19 expressed there would apply to other kinds of 20 claimants in this proceeding, not just PTV, correct? 21 A Yes. 22 Q Is PTV different in some way than the</p>	<p style="text-align: right;">Page 10271</p> <p>1 Q Dr. Crandall, just to clarify something, 2 if you'd look at 56-RX, the NBA exhibit. 3 A The NAB exhibit, okay. Yes. 4 Q And look at Page 4. 5 A The one that's also 174? 6 Q No. 7 A Are we in the same document? 8 Q No, we're not. 9 A Oh, I'm sorry. 10 Q These are the NHL comments. 11 A This one? Oh, the NHL. Oh, I thought you 12 said NAB. Okay. I'm sorry. Okay. NBA. 13 Q Page 4. Page numbered 4 of the -- 14 A Right. Right. Okay. I'm sorry. 15 Q Looking at the middle paragraph there, 16 doesn't it say exactly the opposite of what you and 17 Mr. Garrett agreed that it said? 18 JUDGE von KANN: What page are you on? 19 MR. STEWART: Page 4. 20 THE WITNESS: Let me read this one more 21 time again. 22 (Pause.)</p>
<p style="text-align: right;">Page 10270</p> <p>1 other claimants here with respect to that concern that 2 you raised? 3 A Well, they're the only ones among the 4 major claimants who cannot -- do not qualify for the 5 3.75, so they're different in that respect, from 6 Program Suppliers or Sports or Commercial 7 Broadcasters. 8 Q How does that relate to the particular 9 concern that you express here in your testimony? 10 A Well, it means that they could not be 11 penalized for being a 3.75 signal and being mixed up 12 with another one that's not a 3.75 signal. So the 13 downward bias on them caused by the upward bias on the 14 non-3.75 signal could not occur because they're not -- 15 they could never be included as a 3.75 signal. 16 Q Okay. I have no further questions. Thank 17 you, Dr. Crandall. 18 JUDGE von KANN: Mr. Stewart? 19 MR. STEWART: Yes. I have a few 20 questions. 21 RECROSS EXAMINATION 22 BY MR. STEWART:</p>	<p style="text-align: right;">Page 10272</p> <p>1 THE WITNESS: Well, remind me. What do 2 you think it says. I don't know what the question is. 3 BY MR. STEWART: 4 Q It appears that somehow an interpretation 5 was proposed of the statute that said under which if 6 a television station agreed to reimburse the copyright 7 royalties of a cable operator no matter where the 8 cable operator was, it would then somehow be 9 considered a local signal and therefore eligible for 10 must-carry rights on the cable system. Isn't that 11 what this paragraph is addressing, that argument? 12 A Yes. Yes. 13 Q And I can't say I disagree with it but the 14 leagues here are saying you should not allow that 15 interpretation to prevail because that would allow 16 stations, and WTBS is the particular example, to go 17 out and require carriage of each and every cable 18 operator in the country simply by offering to 19 reimburse the copyright royalties, correct? 20 A Right. And they would lose control. They 21 would then lose control of their -- it would lead to 22 downward pressure on their copyright royalties.</p>

<p style="text-align: right;">Page 10273</p> <p>1 Q And that interpretation that's being 2 opposed here, no matter what the wisdom of it is, 3 would have had the effect of increasing the Copyright 4 Royalty Fund, correct? 5 A The issue here it can be considered a 6 local must-carry station. 7 Q Right. 8 A So if it is indeed -- it remains as an 9 imported distant signal and therefore continues -- 10 that's right, it continues to be considered in the 11 pool. 12 Q What the league is saying here -- what the 13 league is imposing is an argument whereby WTBS could 14 go out and force itself as a distant signal on 15 additional cable operators, therefore, increasing the 16 Fund, and the NBA and NHL are opposing that 17 interpretation; isn't that right? 18 MR. GARRETT: Let me object to the 19 question. I think that Mr. Stewart is wrong here, but 20 regardless of that fact the document's going to speak 21 for itself. The Witness was not familiar with it. 22 Mr. Stewart has asked his questions about it, I've</p>	<p style="text-align: right;">Page 10275</p> <p>1 Immaculate Conception or something. 2 MR. STEWART: Yes. They're Old Testament 3 and we're New Testament. 4 (Laughter.) 5 JUDGE von KANN: Let's go ahead and leave 6 that disputation for a later date. 7 BY MR. STEWART: 8 Q I must say that it's difficult for me to 9 respond to these documents that have been put in as 10 Exhibits 6-R and 7-R, but let me just ask a couple of 11 questions about them. If you look at 7-R. 12 A Let me get them out here so I know what 13 we're talking about. Is it this one? Okay. All 14 right. 15 Q Do you know, Dr. Crandall, what the 16 Association of Local Television Stations, Inc. is? 17 A It's an association of local television 18 broadcasters. I don't recall what their membership is 19 made up of. Mr. Garrett said that they were non-ABC, 20 CBS and NBC affiliates. 21 Q They're actually less than that. They are 22 -- they do not represent the commercial broadcast</p>
<p style="text-align: right;">Page 10274</p> <p>1 asked my questions about it, and I would just simply 2 say we could argue what it means, but I think I know 3 what the sports leagues were saying. 4 JUDGE von KANN: Well, you may but since 5 you can't testify -- 6 MR. GARRETT: Well, sure I can. 7 (Laughter.) 8 MR. GARRETT: That's what going to happen 9 if he keeps asking these questions. I will be 10 testifying. Dr. Crandall, obviously, is of no further 11 assistance on this matter. 12 JUDGE von KANN: Well, do you wish to 13 pursue it, Mr. Stewart? 14 MR. STEWART: No. I think it actually 15 speaks for itself, and I was simply following up on 16 the testimony that Mr. Garrett elicited from Dr. 17 Crandall. 18 JUDGE von KANN: Let's say that when this 19 subject periodically erupts in this hearing I keep 20 having this vision of Martin Luther and the Pope 21 quoting various passages of the Bible to try to debate 22 a particularly difficult part of the Doctrine of</p>	<p style="text-align: right;">Page 10276</p> <p>1 industry, do they? 2 A Well, not the entire commercial broadcast 3 industry. 4 Q And, let's see, on Page 5, he pointed you 5 to a footnote that said in the second sentence, "Local 6 stations rarely have secured monetary consideration 7 from cable systems for granting retransmission 8 consent;" do you see that? 9 A What page are we on now, I'm sorry? 10 Q Page 5. 11 A Yes. Yes. Okay. Yes. 12 Q And you see the sentence immediately after 13 the one he asked you to read? Would you read that, 14 the "No basis exists"? 15 A "No basis exists for presuming that 16 program producers would fair any better." 17 Q Do you know whether program producers 18 already had the right under the retransmission consent 19 regime to seek to obtain compensation for the granting 20 of retransmission consent rights? 21 A Independently of the station itself? 22 Q By acquiring that right from the station,</p>

1 by negotiating it.

2 A Oh, they can negotiate that, that's right.

3 Q And, I guess, finally, looking at --

4 A And you're asking about that no basis
5 exists for presuming that program producers would fair
6 any better.

7 Q Yes.

8 A I mean I don't know what that means and
9 it's not an assertion from the program producers, it's
10 an assertion from someone from the local television
11 stations. The program producers, as I understand it,
12 are in favor of eliminating compulsory copyright. Is
13 he saying that they don't know their own self
14 interest?

15 Q Are you saying that broadcasters don't
16 know their own self-interest? I think that's fairly
17 -- that's what you have been saying, Dr. Crandall.

18 Going to finally to 6-R and just the issue
19 of the continuing existence of the compulsory license.
20 First of all, it appears that in this testimony from
21 11 years ago Mr. Fritts did support some modification
22 reform of the compulsory license, right?

1 either local or distant, right?

2 A Yes.

3 Q And then a part of 111 says and when it's
4 distant you pay money for it, and the money gets
5 distributed among the copyright owners, correct?

6 A Yes.

7 Q If you didn't have a compulsory license,
8 you would have a situation in which all local
9 television stations could be turned off of all of the
10 local cable systems in their market through the
11 operation of the music licensing societies or one of
12 the sports representatives who would simply refuse to
13 permit the retransmission of that program on the local
14 cable system?

15 A It would be the same as any other program
16 supplier; that is, they'd have to negotiate for that
17 privilege. They couldn't get it for nothing. They
18 might have to pay the cable system for carriage the
19 way some other entities do or they might get paid for
20 carriage depending upon the value of their
21 programming.

22 Q From the perspective of a broadcaster

1 A I don't know. I only know that document
2 to the extent that Mr. Garrett was pointing me to
3 various sentences.

4 Q Okay. And Mr. Garrett pointed you to
5 sentences that talked about elimination of the
6 compulsory license resulting in significant
7 dislocations in the current marketplace; do you recall
8 that?

9 A Yes, I remember.

10 Q Now, are you aware, Dr. Crandall, that the
11 compulsory license is what permits cable operators to
12 retransmit to local stations within their own market?

13 A Well, there are -- yes, there is a --
14 there's always been for some time a retransmission
15 consent for local stations.

16 Q Not retransmission consent.

17 A I'm sorry, I mean compulsory license. I
18 misspoke.

19 Q Section 111 --

20 A Right.

21 Q -- permits cable operators to retransmit
22 local television -- retransmit television stations,

1 licensed to serve the Washington market, let's just
2 say, the prospect of being unavailable -- being made
3 unavailable in all of the cable households in its
4 local Washington market because of the position of one
5 of the program suppliers on its station would be a
6 fairly substantial dislocation for the local broadcast
7 industry, would it not?

8 A Yes, it would. And it suggests that maybe
9 the point that I made in my testimony and I'm going to
10 reiterate here is valid, which is that you might have
11 to offer it at a very low price and maybe even a
12 negative price. And the seller's perspective would be
13 that you offer it at a very low price.

14 Q In a local market.

15 A Yes.

16 Q And in fact it's free at this point.

17 A Yes.

18 Q There is no compulsory license fee for
19 local retransmission, correct?

20 A Right. That's my understanding, yes.

21 Q Can you understand would it be reasonable
22 from your perspective for the broadcast industry to

<p style="text-align: right;">Page 10281</p> <p>1 have a position or to have had a position back in 1992</p> <p>2 that the elimination of the compulsory license, given</p> <p>3 the effect it would have on local market carriage of</p> <p>4 all of the local broadcast stations, would be a</p> <p>5 substantial dislocation of the broadcast industry?</p> <p>6 A I don't know if it would be reasonable but</p> <p>7 I'm not -- I don't know -- this was talking about the</p> <p>8 elimination of compulsory license for local as well as</p> <p>9 imported distant signal or just imported distant</p> <p>10 signals.</p> <p>11 Q Right. If the question were only whether</p> <p>12 there should be a compulsory license for distant</p> <p>13 signals, do you have information about the broadcast</p> <p>14 stations' position with respect to that?</p> <p>15 A No, I do not.</p> <p>16 Q And in this proceeding, the broadcast</p> <p>17 industry is here seeking a substantial increase in the</p> <p>18 royalties that are paid for distant signal</p> <p>19 retransmissions of its programs; you understand that.</p> <p>20 A I'm sorry, give me that again.</p> <p>21 Q What we're here for right now, today, is</p> <p>22 to get the money which isn't available in the free</p>	<p style="text-align: right;">Page 10283</p> <p>1 Q Could you explain why?</p> <p>2 A Because I think that it's very difficult</p> <p>3 to do so, and I have a little bit of information I</p> <p>4 thought would help the Panel on how the seller's</p> <p>5 perspective would take place, but it's very difficulty</p> <p>6 to figure out how all of these forces would work out.</p> <p>7 We've been discussing various positions that lobbying</p> <p>8 interests have taken on eliminating the compulsory</p> <p>9 copyright because they wanted higher rates or a</p> <p>10 different system of distribution. In fact, my</p> <p>11 position is that the Bortz survey serves -- unadjusted</p> <p>12 serves as the best possible indicator of relative</p> <p>13 value in this proceeding.</p> <p>14 Q And without trying to take any look at the</p> <p>15 seller's side.</p> <p>16 A I think that would be the best approach,</p> <p>17 but if there is such an adjustment, I think I've</p> <p>18 indicated how I think. At least there's some evidence</p> <p>19 that suggests how it should go.</p> <p>20 Q Okay. Thank you.</p> <p>21 A Sure.</p> <p>22 JUDGE von KANN: Any other recross or</p>
<p style="text-align: right;">Page 10282</p> <p>1 marketplace under the compulsory license to compensate</p> <p>2 broadcast stations for those programs that they own.</p> <p>3 A But to oppose the elimination of this</p> <p>4 institution for fear that the rates you'd have to sell</p> <p>5 your programming would be lower and you'd actually</p> <p>6 obtain less, and that's the point of the seller's</p> <p>7 perspective.</p> <p>8 Q In the local market?</p> <p>9 A Well, in this particular proceeding, we're</p> <p>10 only talking about imported distant signals.</p> <p>11 Q Correct. Only exported distant signals</p> <p>12 from the broadcasters --</p> <p>13 A Right. Right.</p> <p>14 Q Thank you. No further questions.</p> <p>15 JUDGE von KANN: Mr. Hester?</p> <p>16 MR. HESTER: A quick one.</p> <p>17 BY MR. HESTER:</p> <p>18 Q Dr. Crandall, Mr. Garrett started his</p> <p>19 edamination of you by asking whether you were urging</p> <p>20 that the CARP take account of the seller's</p> <p>21 perspective, and I believe you said no.</p> <p>22 A That's correct.</p>	<p style="text-align: right;">Page 10284</p> <p>1 redirect?</p> <p>2 MR. GARRETT: As the representative of the</p> <p>3 Pope, I think I will pass.</p> <p>4 JUDGE von KANN: Okay. The Pope passes.</p> <p>5 We need to speak for one moment before Dr. Crandall</p> <p>6 leaves. Let us talk for a second.</p> <p>7 (Whereupon, the foregoing matter went off</p> <p>8 the record at 2:55 p.m. and went back on</p> <p>9 the record at 3:10 p.m.)</p> <p>10 JUDGE von KANN: Before Dr. Crandall</p> <p>11 leaves, we did want to raise one matter. Yesterday,</p> <p>12 in the course of his testimony, Dr. Fairley indicated</p> <p>13 that there were certain adjustments that he believed</p> <p>14 were appropriate with respect to the Bortz numbers in</p> <p>15 order to adjust for certain biases that he perceived</p> <p>16 in the Bortz survey. And he calculated those in the</p> <p>17 composite form or the aggregated form but not</p> <p>18 presented separate calculations, and the Panel</p> <p>19 afforded PTV an opportunity to present those</p> <p>20 calculations for the separate incremental effects of</p> <p>21 each adjustment with the right of the parties</p> <p>22 tomorrow, if they wish, to have Dr. Fairley recalled</p>

<p style="text-align: right;">Page 10285</p> <p>1 for cross examination about that.</p> <p>2 Today, Dr. Crandall was cross examined</p> <p>3 some about a perception on his part that the Rosston</p> <p>4 analysis contains a bias in favor of PTV with respect</p> <p>5 to the 3.75 matter. He has not presented to us to</p> <p>6 date any specific calculation of the impact of that</p> <p>7 bias or how one would adjust for it. We, therefore,</p> <p>8 wanted to ask you, Mr. Garrett, sort of in fairness</p> <p>9 and in parallel, whether you would like the</p> <p>10 opportunity to let Dr. Crandall present, perhaps</p> <p>11 tomorrow, a calculation of that impact of that</p> <p>12 particular bias if that can be done readily -- I</p> <p>13 frankly don't know how complicated it is to do -- with</p> <p>14 a similar opportunity that it would be given to other</p> <p>15 parties and they would have a chance to cross examine</p> <p>16 him about it. I don't obviously know what Dr.</p> <p>17 Crandall's schedule is. He does live here as opposed</p> <p>18 to California. And it's up to you, I think, really.</p> <p>19 It was not something that was included in the</p> <p>20 rebuttal, and I don't know how quickly it can be done,</p> <p>21 and I don't know what desire you do or don't have to</p> <p>22 present that.</p>	<p style="text-align: right;">Page 10287</p> <p>1 what's involved here in terms of time, expense and</p> <p>2 whether the end product is something that will be in</p> <p>3 fact useful, just having discussed this, the broader</p> <p>4 issue, generally, before. But given your specific</p> <p>5 request, let me talk to Dr. Crandall and see where we</p> <p>6 go.</p> <p>7 JUDGE von KANN: All right. Mr. Stewart?</p> <p>8 MR. STEWART: I understand that you have</p> <p>9 discussed this and made this request, but I have a</p> <p>10 strong objection. One of your orders said that to the</p> <p>11 extent a party criticizes the quantitative evidence of</p> <p>12 another party because of a defect, they are required</p> <p>13 to provide the quantitative impact of that defect, and</p> <p>14 I'm prepared to argue this in proposed findings, if</p> <p>15 there is a bias of the kind that Dr. Crandall</p> <p>16 suggested but it was incumbent on him in his rebuttal</p> <p>17 testimony, pursuant to your order, to provide that</p> <p>18 impact. Dr. Fairley, on the other hand, did precisely</p> <p>19 that. He did it in a way that was consolidated, and</p> <p>20 it seems to me that what arose during the course of</p> <p>21 his testimony was an interest of the Panel in knowing</p> <p>22 the impact, the quantitative impact of less than all</p>
<p style="text-align: right;">Page 10286</p> <p>1 And I guess the first question is whether</p> <p>2 you have a desire to do that, and then if you do, we'd</p> <p>3 have to consider what time frame is reasonable and</p> <p>4 appropriate. Maybe you're not interested or maybe</p> <p>5 you're interested but it can't be done by tomorrow or</p> <p>6 whatever. Then we'll have to figure that out. So we</p> <p>7 thought that since to some extent we afforded that</p> <p>8 opportunity to the PTV we should afford you a similar</p> <p>9 opportunity if you wished to do it.</p> <p>10 MR. GARRETT: Well, I guess the answer is</p> <p>11 I don't know without talking to Dr. Crandall. I would</p> <p>12 still maintain my objection to Dr. Fairley to do what</p> <p>13 he's doing, but I understand what you're asking or</p> <p>14 offering here. But I would need to talk to --</p> <p>15 JUDGE von KANN: Would you like for us to</p> <p>16 give you a short break to do that, have that</p> <p>17 conversation?</p> <p>18 MR. GARRETT: I think that would probably</p> <p>19 be appropriate.</p> <p>20 JUDGE YOUNG: And we may be able to work</p> <p>21 out something on the timing if that's the intent.</p> <p>22 MR. GARRETT: Yes. I just don't know</p>	<p style="text-align: right;">Page 10288</p> <p>1 of the changes that he proposed. I think this is a</p> <p>2 different situation, and I would just make my position</p> <p>3 known for the record.</p> <p>4 JUDGE von KANN: Well, I think it is a</p> <p>5 somewhat different situation, and, frankly, the point</p> <p>6 you raise is an interesting one. Why don't we find</p> <p>7 out if it's a moot point or not, because if Mr.</p> <p>8 Garrett elects not to avail himself of the</p> <p>9 opportunity, we'll not have to decide it. But if he</p> <p>10 wishes to, then I guess we'll have to think a little</p> <p>11 bit about what you've just said. So let's take just</p> <p>12 a few minutes and let you speak to Dr. Crandall, and</p> <p>13 you may come back and say, "Thank you very much but</p> <p>14 we're not interested." Then it becomes a non-issue.</p> <p>15 Okay? Ten minutes or something like that? Is that --</p> <p>16 MR. GARRETT: Ten minutes should be fine.</p> <p>17 (Whereupon, the foregoing matter went off</p> <p>18 the record at 3:17 p.m. and went back on</p> <p>19 the record at 3:37 p.m.)</p> <p>20 JUDGE VON KANN: Okay. Mr. Trautman,</p> <p>21 welcome back. Have a seat and be sworn.</p> <p>22 WHEREUPON,</p>

<p style="text-align: right;">Page 10289</p> <p>1 JAMES TRAUTMAN</p> <p>2 was called as a witness and, having been first duly</p> <p>3 sworn, assumed the witness stand, was examined and</p> <p>4 testified as follows:</p> <p>5 JUDGE VON KANN: And I think earlier we</p> <p>6 had a request from Program Suppliers for about 30</p> <p>7 minutes or so, and Mr. Hester about the same, and Mr.</p> <p>8 Satterfield perhaps 15. And I don't remember if we</p> <p>9 talked about the order. Any preference?</p> <p>10 MR. TUCCI: I can make this somewhat</p> <p>11 easier, because I'm revising my 30 minutes down to</p> <p>12 zero.</p> <p>13 JUDGE VON KANN: Oh.</p> <p>14 MR. TUCCI: For now.</p> <p>15 JUDGE VON KANN: Okay. Well, that's fine.</p> <p>16 Mr. Hester, do you want to go next?</p> <p>17 MR. HESTER: All right.</p> <p>18 JUDGE VON KANN: Okay. Go first.</p> <p>19 MR. HESTER: I may also have less than a</p> <p>20 half an hour.</p> <p>21 JUDGE VON KANN: Okay.</p> <p>22 CROSS EXAMINATION</p>	<p style="text-align: right;">Page 10291</p> <p>1 Q And I take it you would agree with me that</p> <p>2 in the very next sentence after the sentence you're</p> <p>3 referring to in that CRT decision, the CRT also</p> <p>4 concluded that an adjustment was nonetheless required</p> <p>5 to the Bortz survey in that year.</p> <p>6 A I'm not aware what the -- of the specific</p> <p>7 sequence in which it occurred. I'm aware that there</p> <p>8 was a conclusion regarding an adjustment.</p> <p>9 Q Mr. Trautman, can you find the 1989</p> <p>10 decision in there? I'm not sure I know which tab</p> <p>11 number it is.</p> <p>12 JUDGE VON KANN: 14.</p> <p>13 MR. HESTER: 14.</p> <p>14 JUDGE VON KANN: 14 it should be. And</p> <p>15 what page, please?</p> <p>16 MR. HESTER: This is at the very bottom of</p> <p>17 15299 and over to the top of 15300.</p> <p>18 BY MR. HESTER:</p> <p>19 Q Do you have that? I'm in the far right-</p> <p>20 hand column at the bottom of 15299.</p> <p>21 A Yes.</p> <p>22 Q There's a sentence at the bottom of</p>
<p style="text-align: right;">Page 10290</p> <p>1 BY MR. HESTER:</p> <p>2 Q Good to see you again, Mr. Trautman. I'm</p> <p>3 Tim Hester, representing the Public Television</p> <p>4 Claimants.</p> <p>5 A Hello.</p> <p>6 Q I wanted to ask you, if you could, to turn</p> <p>7 to page 1 of your testimony.</p> <p>8 A Yes.</p> <p>9 Q At the very bottom of the page, this is</p> <p>10 where you are discussing the issue of the fact that</p> <p>11 only those that carried public television signals were</p> <p>12 actually asked to put a value on it in the survey,</p> <p>13 correct?</p> <p>14 A Yes, it is.</p> <p>15 Q And you say, at the very bottom of the</p> <p>16 page, discussing the 1989 CRT decision, you say that</p> <p>17 the CRT agreed with this approach in its 1989</p> <p>18 decision, concluding that asking questions about the</p> <p>19 value of distant signal programming in instances where</p> <p>20 it was not carried would cause confusion. Do you see</p> <p>21 that?</p> <p>22 A I see that, yes.</p>	<p style="text-align: right;">Page 10292</p> <p>1 page 15299 where the Panel -- I'm sorry, the CRT in</p> <p>2 that proceeding said, "The Tribunal appreciates that</p> <p>3 the survey was designed to refer the Respondent to</p> <p>4 actual carriage during 1989, and asking them to assess</p> <p>5 how much they might have spent on PBS would have</p> <p>6 caused confusion." Do you see that?</p> <p>7 A I see that, yes.</p> <p>8 Q And that's what you're referring to in</p> <p>9 your testimony at the bottom of page 1?</p> <p>10 A Yes.</p> <p>11 Q And then, in the next sentence, the CRT</p> <p>12 said, "Therefore, the design of the survey is not</p> <p>13 faulted, but an adjustment nonetheless needed to be</p> <p>14 made." Do you see that?</p> <p>15 A I see that sentence, yes.</p> <p>16 Q And the adjustment that the CRT adopted in</p> <p>17 that proceeding was on the basis of its conclusion</p> <p>18 that the survey results underrepresented PBS?</p> <p>19 A Yes. I don't agree with their conclusion,</p> <p>20 but I -- I do see the indication that an adjustment</p> <p>21 was made.</p> <p>22 Q Right. Now, I wanted to ask you to go to</p>

Certificate of Service

I hereby certify that on Monday, February 12, 2018 I provided a true and correct copy of the Robert Crandall Rebuttal Oral Testimony (JSC Written Direct Statement Vol. III) to the following:

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Signed: /s/ Michael E Kientzle